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RECORD, CASE No. 14,430.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 988. 647 357

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. L. PATTERSON, COUNTY TREASURER OF GALLATIN COUNTY, MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED NOVEMBER 28, 1890.

RECORD, CASE No. 14,466.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 988.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. L. PATTERSON, COUNTY TREASURER OF GALLATIN COUNTY, MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1892.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to J. L. Patterson, county treasurer of Gallatin county, Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of October, in the year of our Lord one thousand eight hundred and ninety.

JOHN M. HARLAN,
Associate Justice Sup. C't U. S.

1½ [Endorsed:] In the Supreme Court of the United States. Northern Pac. R. R. Co., plaintiffs in error, *vs.* J. L. Patterson, county treasurer of Gallatin Co., defendant in error. Citation. Filed Oct. 6th, 1890. Wm. J. Kennedy, clerk, by Geo. W. Sproule, deputy.

STATE OF MONTANA,
County of Lewis and Clarke.

I hereby admit due service of this notice and order this 6th day of October, 1890.

H. J. HASKELL,
Att'y General and Att'y for J. L. Patterson.

2 At a supreme court begun and held at Helena on Monday, the 14th day of July, in the year of our Lord one thousand eight hundred and ninety, within and for the State of Montana.

Present: The Honorable Henry N. Blake, chief justice; Edgar N. Harwood, associate justice; William H. De Witt, associate justice.

Be it remembered, to wit, on the 10th day of October, A. D. 1890, the same being during the session of the July term of said court, there was filed in the office of the clerk of said court a certain præcipe in words and figures following, viz:

STATE OF MONTANA:

In the Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY
v.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana.

To the clerk of said supreme court.

SIR: You will please prepare a complete transcript of the record

in the above-entitled action to be attached to the writ of error heretofore issued from the Supreme Court of the United States. Please furnish us with the same at your earliest convenience.

Very respectfully,

F. M. DUDLEY,
CULLEN, SANDERS & SHELTON,
Att'ys for Nor. Pac. R. R. Co.

3 (Endorsed:) Nor. Pac. Railroad Company *v.* J. L. Patterson, treas., &-. Precipe for transcript o f record. Filed Oct. 10th, 1890. W. J. Kennedy, clerk, by Geo. W. Sproule, deputy.

4 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Northern Pacific Railroad Company, appellant, and J. L. Patterson, county treasurer of Gallatin county, Montana, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

5 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the first day of October, in the year of our Lord one thousand eight hundred and ninety.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed this October 1, 1890.

JOHN M. HARLAN,
Associate Justice Sup. Court of the U. S.

5½ [Endorsed:] In the Supreme Court of the United States. Northern Pacific R. R. Co., plaintiffs in error, *vs.* J. L. Patterson, county treasurer of Gallatin Co., defendant in error. Writ of error. Filed Oct. 6th, 1890. Wm. J. Kennedy, clerk, by Geo. W. Sproule, deputy.

6 In the District Court of the Sixth Judicial District of the State of Montana within and for the County of Gallatin.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana, Defendant.

Be it remembered that among the proceedings, records, and pleadings had, made, filed, and entered in the above entitled cause in said district court were the following, to wit:

7 On the 17th day of February, A. D. 1890, the plaintiff filed his complaint, which is in the words and figures following, to wit:

In the District Court of the Sixty Judicial District of the State of Montana within and for thr County of Gallatin.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana, Defendant.

Said plaintiff, for cause of action herein, complains and alleges:

I.

That the Northern Pacific Railroad Company is a corporation created and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and resolutions supplementary thereto and amendatory thereof, and was and is thereby authorized and empowered to build, construct, and operate a railroad and telegraph line from Lake Superior to Puget sound, as therein specified.

8 II.

That by the third section of said act of Congress of July 2nd 1884, it was, among other things, enacted as follows, to wit:

"SEC. 3. And be it further enacted, That there be, and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd
9 numbers, not more than ten miles beyond the limits of said alternate sections; Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which, lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate confederate and associate with said company upon the terms named in the first section of this act; Provided further, that all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections, nearest to the line of said road, may be selected as above provided; and provided further, that the word 'mineral,' when it occurs in this act shall not be held to include iron or coal."

That by the fourth section of said act it was, among other things, enacted as follows:

"And be it further enacted, That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in good, substantial and workmanlike

10 manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States and patents of land as aforesaid, shall be issued to said company, confirming to said company the right and title to said land situated opposite to, and coterminous with said completed section of said road; and from time to time whenever twenty additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid; Provided, that not more than ten sections of land per mile as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act."

11 III.

That under and in pursuance of the said several acts and joint resolutions of Congress the plaintiff has heretofore definitely fixed the line of said road extending from the waters of Lake Superior to Puget sound, on the Pacific coast, and duly filed a plat thereof in the office of the Commissioner of the General Land Office; that the samre has been accepted and approved by the Secretary of th- Interior and the said Commissioner of th- General Land Office, and that said plaintiff has further and in pursuance of the several acts and joint resolutions of Congress built and caused to be built and put into operation along the said line of definite location so fixed as aforesaid a continuous line of railroad and telegraph extending from the said waters of Lake Superior westwardly to Puget sound, on the Pacific coast, and of the character and material specified in said act and joint resolutions.

That the President of the United States has caused said road so constructed as aforesaid to be examined and has accepted and approved the same as required by said act.

IV.

That the lands described in the schedule marked Schedule "A," hereunto annexed (which schedule and the statement contained therein are hereby made a part of this complaint), and all of the same are situated on and within the distance of forty miles of the plaintiff's said line of railroad as the same was so definitely fixed and described in the plat thereof duly filed with the Commissioner of the General Land Office as aforesaid, and that said lands are in the county of Gallatin, Montana.

12 III.

That under and in pursuance of the said several acts and joint resolutions of Congress the plaintiff has heretofore definitely fixed the line of said road extending from the waters of Lake Superior to Puget sound, on the Pacific coast, and duly filed a plat thereof in the office of the Commissioner of the General Land Office; that the samre has been accepted and approved by the Secretary of the Interior and the said Commissioner of the General Land Office, and that s-id plaintiff has further and in pursuance of the several acts and joint resolutions of Congress built and caused to be built and put into operation along the said line of definite location so fixed as aforesaid a continuous line of railroad and telegraph extending from the said waters of Lake Superior westwardly to Puget sound, on the Pacific coast, and of the character and material specified in said act- and joint resolutions.

That the President of the United States has caused said road so constructed as aforesaid to b- examined and has accepted and approved the same, as required by said act.

IV.

That the lands described in the schedule marked Schedule "A," hereunto annexed (which schedule and the statement contained therein are hereby made a part of this complaint), and all of the same are situated on and within the distance of forty miles of the plaintiff's said line of railroad, as the same was so definitely fixed and described in the plat thereof duly filed with the Commissioner of the General Land Office as aforesaid, and that said lands are in the county of Gallatin, Montana.

13 V.

That the Secretary of the Interior, construing said 3rd section of the act of Congress of July 2nd, 1864, construes the phrase therein contained, "lands free from pre-emption or other claims or rights," to mean only such lands as were at the date of filing said map of definite location as aforesaid free from settlement by a duly qualified pre-emptor or homesteader, whether a filing had been made upon said lands or an entry thereof made or not and whether said settler subsequently abandoned said land or remained in possession thereof and sought to acquire title thereto.

VI.

That the lands so granted to said plaintiff by the acts and joint resolutions aforesaid, if any there are in said county, have never been segregated from the public lands, have never been identified, and that the boundaries of the specific lands in said county so granted to complainant as aforesaid, if any there are, have never been ascertained or determined.

VII.

That neither said lands described in said schedule nor any lands

in said county have ever been certified or patented to the plaintiff, and neither the Government of the United States nor any of its officers or agents have ever determined or ascertained what specific lands, if any, passed to said plaintiff by virtue of said grant, although the said plaintiff has repeatedly asked and petitioned the said United States and its officers, to wit, the Commissioner of the General Land Office and the Secretary of the Interior, to determine the specific lands, if any there are, that inured to said plaintiff under and by virtue of said act of Congress and the joint resolutions and subsequent acts of Congress relating to the same subject-matter; that said plaintiff has performed all the things and conditions upon its part to be done and performed to entitle the said plaintiff to the lands inuring to it under and by virtue of said grant.

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VIII.

That the United States and its officers and agents, to wit, the Commissioner of the General Land Office and the Secretary of the Interior and the President of the United States, have failed and refused to certify said lands so described in said schedule under said grant to the plaintiff or to certify any lands in the county of Gallatin to said plaintiff, but have held and still hold the same suspended for the reason that it is claimed that said lands are mineral and are accepted from the grant to said plaintiff, and the said question as to whether the title to said lands passed to said plaontiff under and by virtue of said act and joint resolutions of Congress and the compliance therewith by said plaintiff is now in controversy and pending before the Commissioner of the General Land Office and the Secretary of the Interior undetermined.

IX.

That said plaintiff has not refunded to the United States the sum of money expended by the United States in surveying said lands, and is unable to repay and refund to said United States the said money so expended until it is determined by the proper officers of the United States what specific lands inure to said plaintiff under and by virtue of said acts of Congress; but that said plaintiff is ready and willing and has been at all times so ready and willing, and has so informed the United States through its proper officers, to pay into the Treasury of the United States the cost of surveying and conveying and all other fees required by law to entitle said plaintiff to patents to all lands that may inure to said plaintiff under and by virtue of said acts of Congress as soon as the same may be determined and ascertained, and that said plaintiff has paid into the Treasury of the United States as surveying fees for the lands within the limits of said grant a large sum of money, to wit, $149,408.72, which said lands the said United States has since refused and failed to certify or patent to said plaintiff, holding the same suspended by reason of a claim that said lands were mineral and were excepted from said grant, and that neither the said United States nor any of its officers or agents have made

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demand upon plaintiff for the surveying, conveying, and other fees upon the land described in the said schedule hereunto annexed, and that they have not refused or failed to certify or patent said lands to said plaintiff by reason of the failure of said plaintiff to pay such fees; but have refused and failed to certify or patent said lands solely because said lands have not been identified as lands passing to said plaintiff under said grant as hereinbefore alleged.

16 X.

That said plaintiff has no other right, title, claim, interest, property, or possession of, in, or to any of the lands or premises described in the said Schedule "A" or either of them except such rights, title, claim, interest, property, or possession, now unknown and uncertain, as said plaintiff may have obtained or secured under and by virtue of the said act of Congress approved July 2nd, 1864, and the subsequent acts and joint resolutions amendatory thereof and supplementary thereto.

XI.

In the year 1889 the officers of the said county of Gallatin, authorized by the laws of the Territory of Montana to assess property therein for purposes of taxation and to levy taxes thereon, pretended to assess all the said parcels of land described in the Schedule "A," hereunto annexed, to the said plaintiff for the purposes of taxation and pretended to levy certain taxes thereon, to wit, the territorial, county, town, and other taxes for that year, amounting in the aggregate to — dollars.

XII.

That all the said contended taxes were and are illegal and void for the reason that said lands so taxed were exempt from assessment and taxation by the Territory of Montana because of the facts hereinbefore stated.

17 XIII.

That, in addition to the fact that said pretended taxes are wholly unauthorized, illegal, and void, the count- treasurer has not given the proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth; that said Schedule "A," hereunto annexed, is a copy of the description of lands as published by said treasurer in said notice; that said notice does not contain the amount of said tax, the amount of the penalty, the cost of publication, or the total amount of the tax, penalty, and cost of publication, as required by law.

XIV.

That, notwithstanding the premises, the defendant, The County Treasurer of said County, has advertised said land described in said Schedule "A," hereunto annexed, and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with penalties and costs, on the 17th

day of February, 1890, at his office in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such lands and the value thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned, and whereby a cloud will be cast upon the title to said lands.

And for the second cause of action against said defendant said plaintiff complains and alleges:

18

I.

That said plaintiff is a corporation created and existing as alleged in the first paragraph of the first cause of action herein.

II.

That said plaintiff is the owner of and entitled to those certain lots and blocks of land in the town of Moreland, county and State aforesaid, described in Schedule "B," hereunto annexed and hereby made a part of this complaint.

III.

That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county.

IV.

That said assessor did not assess said lots and blocks of land, as required by law, and did not determine and fix the true value of such lots and blocks and enter and cause to be entered the same opposite such lots and blocks, as required by law, but assessed and valued all of said lots and blocks together as one parcel of land.

V.

That said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place upon said assessment-roll the valuations of said lots and blocks as returned by said plaintiff, but said assessor did wrongfully and falsely take and subscribe an oath and attach the same to the said assessment-roll, wherein and whereby said assessor did swear
19 that the value of said property was returned in said assessment-roll as set forth in said statement made and returned to said assessor by said plaintiff.

VI.

That the county clerk of said county did not make out a tax-list, as required by law, setting forth the amount of each different tax upon said lots and blocks or containing a separate valuation of said parcels of land.

VII.

That the said county treasurer has not given the proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth, in this, that said notice does not state the tax due on each parcel of said lands nor the total tax due on each of said parcels after adding penalty and cost of advertising; but the Schedule "B," hereunto annexed, is a copy of said notice as published by said treasurer.

VIII.

Notwithstanding the premises, the defendant, The County Treasurer of said County, has advertised the said lands described in said Schedule "B" and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with interest and costs, on the 17th day of February, A. D. 1890, at his office at the court-house, in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such lands and the value
20 thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned and whereby a cloud will be cast upon the title to said lands.

And for a third cause of action against said defendant said plaintiff complains and alleges:

I.

That said plaintiff is a corporation created and existing as alleged in the first paragraph of the first cause of action herein.

II.

That said plaintiff is the owner of and entitled to those certain lots and blocks of land in the town of Gallatin, county and State aforesaid, described in Schedule "C," hereunto annexed and hereby made a part of this complaint.

III.

That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county.

IV.

That said assessor did not assess said lots and blocks of land separately, as required by law, and did not determine and fix the true value of such lots and blocks and enter or cause to be entered the same opposite such lots and blocks on the assessment-roll, as required by law.

21 V.

That said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place

upon said assessment-roll the valuations of said lots and blocks as returned by said plaintiff, but said assessor did wrongfully and falsely take and subscribe an oath and attach the same to the said assessment-roll, wherein and whereby said assessor did swear that the value of said property was returned in said assessment-roll as set forth in said statement made and returned to said assessor by said plaintiff.

VI.

That the county clerk of said county did not make out a tax-list, as required by law, setting forth the amount of each different tax upon said lots and blocks or containing a separate valuation of said separate parcels of land.

VII.

That the said county treasurer has not given proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth in this, that said notice does not state the tax due on each parcel of said land nor the total tax due on each of said parcels after adding penalty and cost of advertising, but that Schedule "C," hereunto annexed, is a copy of said notice as published by said treasurer.

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VIII.

That notwithstanding the premises the county treasurer of said county has advertised the said lots and blocks described in said Schedule "C" and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with interests and costs, on the 17th day of February, A. D. 1890, at his office, at the court-house, in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such land and the value thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned, and whereby a cloud will be cast upon the title to said lands.

Wherefore plaintiff prays that the defendant, The County Treasurer of said County, and his deputy and deputies and his successor and successors in office be forever restrained from selling said lands, blocks, and lots, or any portion thereof for said pretended taxes and from executing any tax certificate or certificates therefor to any person, natural or corporate, and that he be forever restrained from collecting or attempting to collect said taxes, and that said taxes and tax proceedings be declared void and be set aside and cancelled; that a preliminary injunction order restraining said sale forthwith issue, and that plaintiff may have such other and further relief as the court may deem equitable and just in the premises and its costs and disbursements herein.

CULLEN & SANDERS &
ARMSTRONG & HARTMAN,
Att'ys for Plaintiff.

23 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

F. M. Dudley, being first duly sworn, deposes and says that the plaintiff in the above-entitled action is a corporation, and that he is an officer thereof, to wit, land attorney and tax commissioner, and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge.

F. M. DUDLEY.

Subscribed and sworn to before me this 12th day of February, 1890.

JAMES U. SANDERS,
Notary Public.

24 SCHEDULE "A."

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	1	1 S.	1 E.	636
"	Do.	3	"	"	637
"	E. ½, E. ½ N. W. ¼, S. W. ¼ N. W. ¼, S. W. ¼	5	"	"	598
"	S. E. ¼ N. E. ¼, W. ½, S. E. ¼ S. E. ¼, W. ½ S. E.	7	"	"	452
"	All	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	E. ½ of S. W. ¼	19	"	"	469
"	All	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Lot 9	5	1 N.	"	16.65
"	All	13	"	"	640
"	Do.	15	"	"	640
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. ½, E. ½ S. W. ¼, S. E. ¼	29	"	"	560
"	W. ½	31	"	"	352
25					
N. P. R. R. Co.	All	33	1 N.	1 E.	640
"	Do.	35	"	"	640
"	Do.	1	1 S.	2 E.	633.90
"	E. ½ of N. W. ¼	3	"	"	513.74
"	All	7	"	"	613.48
"	S. W. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	E. ½ of S. W. ¼	15	"	"	480
"	N. W. ¼	17	"	"	160
"	All	19	"	"	613.96
"	Do.	23	"	"	640
"	Do.	25	"	"	640

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	Do.	27	1 S.	2 E.	640
"	N. E. ¼ and S. W. ¼	29	"	"	320
"	All	31	"	"	614
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Do.	1	1 N.	2 E.	634.47
"	Do.	3	"	"	641
"	Do.	7	"	"	644
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	S. E. ¼	15	"	"	160
"	N. E. ¼ N. E. ¼, W. ½ N. E. ¼, W. ½, W. ½ S. E. ¼, S. E. ¼ S. E. ¼	17	"	"	560
"	All	19	"	"	640
"	Do.	23	"	"	640
26 "	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. W. ¼, W. ½ S. W. ¼	29	"	"	240
"	All	31	"	"	640
"	Do.	35	"	"	640
"	Do.	1	2 N.	2 E.	646
"	E. ½, E. ½ S. W. ¼, l'ts 3, 7, 8, 9, less W. R.	3	2 N.	2 E.	481
"	S. E. ¼ N. E. ¼, N. E. ¼ S. W. ¼, N. ½ S. E. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	E. ½, E. ½ N. W. ¼, S. W. ¼ S. W. ¼, less 8 acres	15	"	"	472
"	E. ½ S. W. ¼, S. W. ¼ S. W. ¼	17	"	"	120
"	E. ½ E. ½, W. ½, N. W. ¼ N. W. ¼	23	"	"	520
"	All	25	"	"	640
"	W. ½ S. W. ¼, S. E. ¼ N. W. ¼	27	"	"	120
"	S. ½ N. E. ¼, N. W. ¼ N. E. ¼, N. E. ¼ N. W. ¼	29	"	"	160
"	E. ½ N. E. ¼, W. ½, S. E. ¼	33	"	"	560
"	All, less R. W. 26 acres	35	"	"	614
"	Lots 3, 4, 5, less R. of W. 31 acres	23	3 N.	"	36.38
"	All	25	"	"	640
"	E. ½ E. ½, lots 1, 4, 6, 7	27	"	"	332
"	All	35	"	"	640
"	W. ½ N. W. ¼, S. W. ¼, W. ½ S. E. ¼, E. ½ N. E. ¼	1	1 S.	3 E.	399.65
"	All	3	"	"	631.44
"	Do.	5	"	"	628.96
"	Do.	7	"	"	613.60
27 "	Do.	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	615.60
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	640
"	Do.	33	"	"	640
"	Do.	35	"	"	640

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	S. W. ¼	1	1 N.	3 E.	160
"	All	7	"	"	642.62
"	Do.	17	"	"	640
"	Do.	19	"	"	641.60
"	Do.	21	"	"	640
"	W. ½ E. ½, W. ½	27	"	"	480
"	All	29	"	"	640
"	Do.	31	"	"	640.60
"	Do.	33	"	"	640
"	Do.	1	2 N.	3 E.	639.84
"	Do.	3	"	"	640.80
"	Do.	5	"	"	641.64
"	Do.	7	"	"	609.76
"	Do.	9	"	"	640
"	Do.	11	"	"	640
28 "	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	613.84
"	Do.	21	"	"	640
"	Do.	33	"	"	640
"	N. ½, N. ½ S. ½, S. E. ¼ S. E. ¼	27	"	"	520
"	All.	29	"	"	640
"	N. W. ¼, N. W. ¼ S. E. ¼	33	"	"	200
"	All	5	3 N.	3 E.	635.94
"	Do.	9	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	625
"	Do.	21	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	619.47
"	Do.	33	"	"	640
"	Do.	17	4 N.	"	640
"	Do.	21	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	621.66
"	Do.	33	"	"	640
"	Do.	5	3 S.	4 E.	642
"	Do.	7	"	"	616.84
"	W. ½ N. W. ¼, S. W. ¼	9	"	"	240
"	All	17	"	"	650
"	S. ½ S. E. ¼, N. E. ¼ S. E. ¼	27	"	"	120
"	All	31	"	"	627.84
"	N. ½ N. E. ¼, S. W. ¼ N. E. ¼, N. W. ¼ S. E. ¼	33	"	"	160
29 "	N. W. ¼ N. W. ¼	35	3 S.	4 E.	40
"	All	5	2 S.	"	635.24
"	Do.	7	"	"	621.76
"	Do.	9	"	"	640
"	E. ½ E. ½	11	"	"	160
"	E. ½	13	"	"	320
"	S. W. ¼ N. E. ¼, N. E. ¼ S. W. ¼	23	"	"	280
"	All	29	"	"	640
"	Do.	31	"	"	616.08
"	E. ½, S. W. ¼	33	"	"	480
"	N. ½	1	1 S.	"	287.18
"	All	3	"	"	640.68
"	S. E. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ S. W. ¼, S. E. ¼	5	"	"	318.61
"	All	7	"	"	617.52

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	N. ½, W. ½ S. W. ¼, N. E. ¼ S. E. ¼	9	1 S.	4 E.	440
"	All	11	"	"	640
"	Do.	13	"	"	640
"	N. E. ¼, N. E. ¼ N. W. ¼	15	"	"	200
"	N. W. ¼, N. ½ S. E. ¼, S. ½ N. E. ¼	17	"	"	320
"	All	19	"	"	624.48
"	N. ½, S. W. ¼, N. W. ¼ S. E. ¼	25	"	"	520
"	W. ½ N. W. ¼, S. E. ¼ N. W. ¼	27	"	"	120
"	All	31	"	"	621.92
"	N. ½, N. E. ¼ S. W. ¼, N. ½ S. E. ¼, S. E. ¼ S. E. ¼	1	1 N.	4 E.	481.02
"	N. ½ N. W. ¼	3	"	"	81.40
"	E. ½ N. E. ¼	31	"	"	80
"	E. ½, E. ½ N. W. ¼, S. W. ¼, less 18 acres	33	"	"	541.82
30 "	All, less 2 acres	35	1 N.	4 E.	638
"	W. ½	1	2 N.	4 E.	318.52
"	All	15	"	"	640
"	S. ½	13	"	"	320
"	W. ½, W. ½ N. E. ¼, N. W. ¼ S. E. ¼	23	"	"	440
"	All	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	N. ½ N. E. ¼, N. E. ¼ N. W. ¼	33	"	"	120
"	E. ½, E. ½ W. ½, S. W. ¼ S. W. ¼	35	"	"	520
"	All	1	3 N.	4 E.	637.96
"	S. E. ¼	3	"	"	160
"	S. E. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	540
"	S. E. ¼	17	"	"	160
"	S. E. ¼	19	"	"	160
"	All	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	664.88
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Lot 1, N. W. ¼ S. W. ¼	5	2 S.	5 E.	78.77
"	W. ½ N. W. ¼	9	"	"	80
"	N. ½ S. E. ¼, S. E. ¼ S. W. ¼	11	"	"	120
31 "	S. W. ¼ S. W. ¼, S. E. ¼ S. W. ¼	13	2 S.	5 E.	80
"	N. W. ¼	15	"	"	160
"	E. ½ N. E. ¼, N. W. ¼ N. E. ¼	19	"	"	120
"	W. ½	21	"	"	320
"	S. E. ¼	31	"	"	148.47
"	E. ½	33	"	"	320
"	All, less 60 acres	7	1 S.	5 E.	554.24
"	W. ½ E. ½, W. ½	1	"	"	478.71
"	N. ½	11	"	"	320
"	S. E. ¼ N. E. ¼, S. W. ¼ S. E. ¼, E. ½ S. E. ¼, less 16 A.	17	"	"	244
"	W. ½ N. E. ¼, N. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ¼	19	"	"	330
"	S. E. ¼ S. W. ¼	1	1 N.	5 E.	40
"	All	5	"	"	648.60
"	N. W. ¼	7	"	"	149.29

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	S. E. ¼ N. E. ¼	9	1 N.	5 E.	40
"	N. E. ¼ N. W. ¼	11	"	"	40
"	All	1	2 N.	5 E.	641.12
"	S. ½	7	"	"	318.16
"	N. ½ S. E. ¼, N. ½ S. W. 1 *w*	11	"	"	560
"	All	19	"	"	635.84
"	All	23	"	"	640
"	S. W. ¼, S. ½ N. E. ¼, N. ½ S. W. ¼	27	"	"	320
"	All	29	"	"	640
"	Do.	31	"	"	616.72
"	N. ½	33	"	"	320
"	All	7	3 N.	5 E.	632.08
"	Do.	17	3 S.	6 E.	640
"	Do.	19	"	"	625
"	Do.	21	"	"	640
32 "	All	1	2 S.	6 E.	640
"	Do.	3	"	"	640.18
"	E. ½, S. E. ¼ N. W. ¼	5	"	"	359.97
"	S. E. ¼ S. E. ¼	7	"	"	40
"	All	11	"	"	640
"	Do.	13	"	"	640
"	All, less 9 acres	25	"	"	630.50
"	All	29	"	"	640
"	S. W. ¼ S. W. ¼	5	1 S.	6 E.	40
"	N. ½, N. E. ¼ S. E. ¼	7	"	"	346.72
"	S. W. ¼ S. W. ¼	21	"	"	40
"	Lot 2	31	"	"	34.40
"	N. E. ¼	7	1 N.	6 E.	160
"	N. W. ¼, W. ½ S. W. ¼	21	"	"	240
"	All	3	2 S.	7 E.	633
"	S. W. ¼	7	"	"	155.24
"	S. E. ¼	9	"	"	160
"	All, less 50 acres	13	"	"	589.50
"	All	17	"	"	640
"	All, less 16.25 acres R. of W.	19	"	"	617.84
"	All, less 57 " "	21	"	"	583
"	All	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. E. ¼	29	"	"	160
"	All	35	"	"	640
"	All	1	1 S.	1 W.	641.67
"	Do.	3	"	"	639.54
"	Do.	5	"	"	636.05
33 "	All	9	1 S.	1 W.	640
"	Do.	11	"	"	640
"	N. ½, S. W. ¼	13	"	"	480
"	All	15	"	"	640
"	Do.	23	"	"	640
"	S. W. ¼, S. E. ¼, S. W. ¼ N. W. ¼	25	1 N.	1 W.	360
"	S. E. ¼, E. ½ S. W. ¼, S. W. ¼ S. W. ¼	33	"	"	280
"	N. W. ¼ N. E. ¼, W. ½, S. W. ¼ S. E. ¼, E. ½ S. E. ¼	35	"	"	480
"	All	1	3 N.	7 E.	641.24
"	All	3	"	"	642.44
"	Do.	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	S. ½	17	"	"	320

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	19	3 N.	7 E.	626.02
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	N. ½	27	"	"	320
"	All	29	"	"	640
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Do.	1	4 N.	7 E.	979.06
"	Do.	3	"	"	983.04
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	23	"	"	640
34 "	All	25	4 N.	7 E.	640
"	Do.	27	"	"	640
"	Do.	35	"	"	640
"	Do.	19	5 N.	7 E.	632.68
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	640.38
"	Do.	33	"	"	640
"	Do.	35	"	"	640

35 "SCHEDULE B."

N. P. R. R. Co., Moreland; No. of lots, 300: Bl'k 1, lot 1; bl'k 3, lots 13, 14, and 15; bl'k 4, lots 1, 2, 3, 4, 11, 12, and 13; bl'k 5, lots 1, 2, 3, 4, 12, and p't 9, 10, and 11; bl'k 6, frac. lots 1 and 3; bl'k 7, frac. lots 1 and 3; bl'k 8, lots 9, 10, 11, 12, 22, 24, 13, 14, 15, 16, 21, and 23; bl'k 9, lots 9 to 16, inclusive, 25 to 32, inclusive; bl'k 10, lots 1 to 8, inclu., 17 to 24, inclu.; bl'k 11, lots 5 to 8, inclu., 17 to 24, inclu.; bl'k 12, lots 3, p't 4, 13, 14, 15, 16; bl'k 13, p't lot 6; bl'k 15, fract. 1, 2, 11, 12, 13; bl'k 16, 1 to 4, inclusive, 9 to 12, incl.; bl'k 17, lots 1 to 4, 9 to 12, incl.; bl'k 18, 1 to 6, 13, 14, 15, 18, 19, 20, and 21; bl'k 19, 1 to 6, 23 to 27, 13 to 17, incl.; bl'k 20, 1 to 6, 13 to 17, 23 to 27, incl.; bl'k 21, 1 to 6, 13 to 17, 26 to 27, incl.; bl'k 22, 5 to 8, 13 to 16; bl'k 23, 3 and 4, fractional; bl'k 24, fract. 6, 7, and 8; bl'k 25, 5 to 8, 13 to 16, incl.; bl'k 29, 5 to 18, 13 to 16, incl.; bl'k 30, 1 to 16; bl'k 31, 5 to 8, 13 to 16, incl.; bl'k 32, 5 to 8, 13 to 16, incl.; bl'k 33, fract. 11, 12, 13, 14; bl'k 34, 9 and 10; bl'k 35, 5 to 8, 13 to 16, incl.; bl'k 36, 1 to 16, incl.; bl'k 37, 5 to 18, 13 to 16, incl.; bl'k 38, 5 to 8, 13 to 16, incl.; bl'k 40, 5 to 8, 11, fract. 12 and 13; bl'k 41, lot 8; undivided ½ of unplatted triangular piec- of ground, containing 16.42 acres, situated in N. E. corner of N. E. ¼ sec. 10, T. 1 N., R. 3 E.; taxes, $43.44; dil. per cent., $4.34; pub., $4.34; total tax, $52.12.

36 SCHEDULE "C."

N. P. R. R. Co., Gallatin; No. of lots, —: Bl'k 1, lots 2 and 4; bl'k 2, lots 15 and 16; bl'k 3, 13 to 16, inclusive; bl'k 4, 5 to 8, 13 to 16, incl.; bl'k 5, 5 to 8, 13 to 16, incl.; bl'k 6, 5 to 8, 13 to 16, incl.; bl'k 7, 5 to 8, 13 to 16, incl.; bl'k 8, 5 to 8, 13 to 16, incl.; bl'k 9, lots 1 and 2; bl'k 10, 5 to 8, incl.; bl'k 11, 5 to 8, 13 to 16, incl.; bl'k 12, 5 to 8, 13 to 16, incl.; bl'k 13, 5 to 8, 13 to 16, incl.; bl'k 14, 5 to 8, 17 to 24, incl.; bl'k 15, 1 to 8, 17 to 24, incl.; bl'k 16, 5 to 8, 17 to 24, incl.; bl'k 17, 5 to 8, 13 to 16, incl.; bl'k 18, 5 to 8, 13 to 16, incl.; bl'k 19, 3, 4, 7, and 8; bl'k 20, 1 to 5, incl.; bl'k 22, 3 to 8 incl.; bl'k 23, 5 to 8, 13 to 16, incl.; bl'k 24, 5 to 8, 13 to 16, incl.; bl'k 25, 5 to 8, 17 to 24, incl.; bl'k 27, 1 to 8, 17, 18, 19, 20, 21, 2–, 25; bl'k 28, 5 to 8, 17 to 24, incl.; bl'k 29, 5 to 8, 13 to 16, incl.; bl'k 30, 9 to 14; bl'k 31, 9 and 11; bl'k 32, 5 to 8, 13 to 16, incl.; bl'k 33, 1 to 32, incl.; bl'k 34, 1, 5, 8, 11, 14, 15, 16; bl'k 35, 1 to 3, 13 to 24, incl.; bl'k 36, 5 to 8, 13 to 16, incl.; bl'k 37, 5 to 8, 13 to 16, incl.; bl'k 38, 5 to 8, 13 to 16, incl.; bl'k 41, 3 to 24, incl.; bl'k 42, 5 to 8, 13 to 15, incl.; ½ int. in N. E. ¼ N. W. ¼, S. ½ N. W. ¼, N. W. ¼ S. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ¼, N. E. ¼, N. ½ S. E. ¼ sec. 16, T. 2 N., R. 2 E., less R. of W.; tax, $20.08; dil. per cent., $2.00; pub., $2.00; total tax, $24.08.

37 Afterwards, to wit, on the 24th day of February, A. D. 1890, the defendant filee his demurrer to complaint as follows, to wit:

Venue and Caption.

Comes now the above-named defendant and demurs to the complaint on file in this action for the reason that said complaint does not state facts sufficient to constitute a cause of action against defendant.

R. P. VIVION,
County Attorney; and
H. C. COCKRILL,
Defendant's Attorneys.

38 Injunction order filed Feb'y 17th, 1890, as follows, to wit:

(Venue and Caption.)

Injunction Order.

To James L. Patterson, county treasurer of Gallatin county, the defendant above named:

Whereas the plaintiffs in the above-entitled suit has exhibited *his* complaint to this court, duly verified ansd supported by the affidavit of F. M. Dudley, by which it is made to appear that the defendant, The County Treasurer of the County aforesaid, threatens and is about to wrongfully sell, for taxes claimed to be due and delinquent

thereon, those certain parcels of land described in the said complaint and in the schedule- thereunto annexed:

Now, therefore, it is ordered by the court aforesaid that the said defendant, The County Treasurer in and for the said County, and his deputy and deputies and his successor and successors in office be, and each of them is hereby, restrained and enjoined until the further order of this court from selling or attempting to sell any of the parcels of land described in the said complaint and schedules, of which copies are hereunto annexed, to enforce the payment of any of the taxes in said complaint mentioned, upon the giving of a bond in the sum of $500.00, to be approved by the clerk of said court.

39 And it is further ordered that the said defendant show cause, if any there be, before the judge of said court, in the county of Gallatin aforesaid, on the 3rd day of March, A. D. 1890, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why this injunction order should not be continued in full force and effect and said defendant should not be restrained and enjoined from selling said lands as aforesaid during the pendency of this action.

Witness my hand on this fifteenth day of February, A. D. 1890.

FRANK HENRY,

Judge District Court, Gallatin County, State of Montana.

40 Injunction filed Feb'y 17th, 1890, as follows, to wit:

Venue and Caption.

The State of Montana send- greeting to J. L. Patterson, Co. treas. Gallatin county, Montana:

The above-named plaintiff having filed *their* complaint in our district court of the 6th judicial district against the above-named defendant, praying for an injunction against said defendant requiring him to refrain from certain acts in said complaint and hereinafter more particularly mentioned, on reading the said complaint in this action, duly verified by said plaintiff, and it satisfactorily appearing to the judge of said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given—

We, therefore, in consideration thereof and of the particular matters in said complaint set forth, do strictly command you *that* each and every of you that until the further order of said court you and each of you, your and each of your servants, agents, attorneys, employés, successor or successors in office, and all persons acting under the control, authority, or direction of you or either of you, do absolutely refrain from and desist from the sale of any of the lands mentioned in said plaintiff's complaint for said pretende- taxes

41 or for any purpose and from executing any tax certificate or certificates for said land or any part thereof to any person, natural or corporate.

Witness Hon. Frank Henry, judge of the 6th judicial district, at

the court-house, in the county of Gallatin, and the seal of said court this 17th day of Feb'y, A. D. 1890.

[SEAL.]

JOHN McLEOD, *Clerk*,
By R. H. CRAWFORD,
D'p'ty Clerk.

I hereby certify that I received the within writ on the 17th day of February, A. D. 1890, and that I have served the same by exhibiting the within writ to J. L. Patterson, Co. treasurer of Gallatin county, Montana, and by leaving a copy thereof with him, he being the defendant mentioned therein.

This 17th day of February, A. D. 1890.

JAMES M. ROBERTSON,
Sheriff of Gallatin County, Montana.

Copy ---- ----------	$1 00
Service ---- ----------	50
	1 50

42 Motion to dissolve injunction filed March 3rd, 1890, as follows, to wit:

Venue and Caption.

And now comes the above-named defendant and moves the court to dissolve the injunction heretofore granted in this case for reasons following, to wit:

1st. The complaint upon which the said injunction was granted is not verified as required by the law.

2nd. The complaint does not state that the defendant or the county of Gallatin is insolvent.

3rd. The complaint does not state and show that the plaintiff therein has no speedy or adequate remedy at law.

4th. The said complaint does not state directly that the title to the lands described in Schedule "A," annexed to the same and made a part thereof, is in the said plaintiff.

R. P. VIVION,
County Att'y.

43 Order sustaining demurrer to complaint and dissolving injunction and decree filed April 2nd, 1890, as follows, to wit:

Venue and Caption.

This cause coming on regularly to be heard on the 4th day of March, A. D. 1890, on the motion of defendant to dissolve the injunction theretofore granted in this cause, and also defendant's demurrer to plaintiff's complaint on file herein, the court, after hearing the argument of counsel both for the said plaintiff and defendant, took the case under advisement; and now, on this 2nd day of April, A. D. 1890, this being one of the days of the regular March term of said court, begun and holden at said county of Gallatin on

the 3rd day of March, 1890, having fully considered this cause—made its order sustaining the said motion to dissolve said injunction, as also its order sustaining defendant's demurrer to plaintiff's complaint on file herein, and the plaintiff having elected to stand upon his complaint and declining to amend the same—

It is therefore ordered, adjudged, and decreed by the court that the said defendant, J. L. Patterson, treasurer as aforesaid, proceed to advertise and sell said property described in plaintiff's complaint herein in the manner and as the law directs, and by that means collect the amount of taxes due the said county of Gallatin from the said plaintiff for the year 1889, together with the cost of readvertising the sale of said lands, and that the defendant do have
44 and recover judgment against the said plaintiff for his costs in this behalf expended, taxed at $2.50.

FRANK HENRY, *Judge.*

45 Notice of appeal filed May 31st, 1890, as follows, to wit:

Venue and Caption.

To said defendant, J. L. Patterson, count- treasurer, and R. P. Vivion and H. C. Cockrill, attorneys for said defendant:

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of Montana from the order sustaining the motion to vacate the injunction issued in said action, from the order sustaining the demurrer to plaintiff's complaint therein, and from the judgment made and entered in said action on the 2nd day of April, A. D. 1890, in favor of the defendant in said action and against said plaintiff and from the whole thereof.

Dated May 31, 1890.

ARMSTRONG & HARTMAN,
Attorneys for Plaintiff.

Service accepted and copy waived this 31st day of May, 1890.
VIVION AND COCKRILL,
Attorneys for Defendant.

46 Undertaking on appeal filed May 31st, 1890, as follows, to wit:

Venue and Caption.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of the State of Montana from the order of said district court sustaining the demurrer to plaintiff's complaint in said action, from the order of said district court dissolving the injunction in said action, and from the judgment of said district court made and entered on the 2nd of April, 1890; which said judgment is in favor of said defendant and against said plaintiff:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders of and in the

said Gallatin county, do hereby, jointly and severally, undertake and promise on the part of the appellant that it, the said appellant, will pay all damages and costs that may be awarded against it on the appeal or on a dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

Sealed with our seals and dated this May 31, 1890.

JNO. S. MENDENHALL. [SEAL.]
JOSEPH D. RADFORD. [SEAL.]

47 STATE OF MONTANA, } ss:
Gallatin County, }

John S. Mendenhall and Joseph D. Bradford, the sureties above named, being severally duly sworn, each for himself says he is a resident and freeholder within the county of Gallatin, State of Montana, and is worth the amount specified in said undertaking (to wit, $300.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

JNO. S. MENDENHALL.
JOSEPH D. RADFORD.

Subscribed and sworn to before me this 31st day of May, 1890.

CHAS. S. HARTMAN,
Notary Public.

48 Undertaking on injunction; approved and filed February 17th, 1890, *and* is in words and figures as follows, to wit:

In the Sixth Judicial District Court of the State of Montana in and for the County of Gallatin.

NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
—
J. L. PATTERSON, as Treasurer of Gallatin County, Montana, Def't.

Whereas the above-named *defendants* commenced or is about to commence an action in the district court of the sixth judicial district of the State of Montana in and for the county of Gallatin against the above-named defendant, and is about to apply for an injunction in said action restraining him from the commission of certain acts, as in the complaint filed in said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of Gallatin, State of Montana, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of $500.00 and promise to the effect that in case said injunction shall issue said plaintiff will pay to the party enjoined such damages, not exceeding the sum of $500.00, as such party may sustain by reason of the said injunction if the court finally decides that the plaintiff was not entitled thereto.

Dated this 17th day of February, 1890.

J. E. MARTIN.
LESTER S. WILLISON.

49 STATE OF MONTANA, } ss:
County of Gallatin, }

J. E. Martin and Lester S. Willison, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth thre amount specified in the undertaking as th- penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident freeholder in the count- of Gallatin, State of Montana.

J. E. MARTIN.
LESTER S. WILLISON.

Subscribed and sworn to before me this 17th day of February, 1890.

CHAS. S. HARTMAN,
Notary Public.

STATE OF MONTANA, } ss:
County of Gallatin, }

I, John McLeod, clerk of the district court of the sixth judicial district of the State of Montana in and for the county of Gallatin, do hereby certify th- foregoing to be a full, true, and correct copy of the original undertaking on injunction in the case of Northern Pacific Railroad Company, plaintiff, *vs.* J. L. Patterson, as treasurer of the county of Gallatin, Montana, defendant, now on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Bozeman, on this 9th day of July, A. D. 1890.

[SEAL.] JOHN McLEOD, *Clerk.*

50 STATE OF MONTANA, } ss:
County of Gallatin, }

I, John McLeod, clerk of the district court of the sixth judicial district of the State of Montana in and for the county of Gallatin, do hereby certify that the foregoing 41 pages contain a full, true, and correct transcript of certain of the plea-ings, records, and proceedings filed, made, and had in said court in the cause of The Northern Pacific Railroad Company, plaintiff, against J. L. Patterson, county treasurer of Gallatin county, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of June, A. D. 1890.

[SEAL.] JOHN McLEOD, *Clerk.*

51 *Proceedings in the Supreme Court of Montana.*

MONDAY, *July 14th, A. D.* 1890.

(Title of Court & Cause.)

This cause is set down for hearing on Monday, July 21st, at 10 o'clock a. m.

TUESDAY, *July 22nd, A. D.* 1890.

Title of Court & Cause.

This cause was argued by counsel, submitted, and taken under advisement by the court.

FRIDAY, *August 1st, A. D.* 1890.

Title of Court and Cause.

This cause came on this day for the judgment and decision of the court on appeal; whereupon, on consideration, it is now here ordered and adjudged by this court that the order and judgment of the court below, made and entered in this cause on the 2nd day of April, A. D. 1890, be, and the same is hereby, affirmed with costs.

Blake, C. J., delivered the opinion, Harwood, J., and De Witt, J., concurring.

The opinion is as follows:

52 In the Supreme Court of Montana, July Term, 1890.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
J. L. PATTERSON, County Treasurer of Gallatin County, Respondent.

Opinion of the court by BLAKE, *C. J.:*

This action was commenced by the appellant to obtain an injunction to restrain the county treasurer of the county of Gallatin, in this State, from selling certain lands, blocks, and lots by reason of the taxes which had been levied thereon in the year 1889, or collecting the same, and also a decree that said taxes should be adjudged void.

The complaint alleges that the plaintiff is a corporation under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and approved July 2, 1864. The second and third sections of this act are set forth and describe the public lands which are granted to the railroad by the United States.

The particular acts of the plaintiff are then alleged showing that all the conditions of the statute have been performed by the corporation.

"The lands described in the schedule marked Schedule A * * * are situated on and within the distance of forty miles of the plaintiff's said line of railroad as the same was so definitely fixed
53 and described in the plat thereof, duly filed with the Commissioner of the General Land Office as aforesaid, and that said lands are in the county of Gallatin, Montana." It is further alleged that "the lands so granted to said plaintiff, * * * if any there are in said county, have never been segregated from the public lands, have never been identified, and that the boundaries * * * have never been ascertained or determined."

It is also alleged that the officers of the United States have "failed and refused to certify said lands * * * to the plaintiff or to certify any lands in the county of Gallatin to said plaintiff, * * * but have refused and failed to certify or patent said lands solely because said lands have not been identified as lands passing to said plaintiff under said grant, as hereinbefore alleged."

It is further alleged: "In the year 1889 the officers of the said county of Gallatin, authorized by the laws of the Territory of Montana to assess property therein for the purposes of taxation and to levy taxes thereon, pretended to assess all the said parcels of land described in the Schedule "A" * * * to the said plaintiff for the purposes of taxation, and pretended to levy certain taxes thereon, to wit, the territorial, county, town, and other taxes for that year; * * * that all the said * * * taxes were and are illegal and void for the reason that said lands so taxed were exempt from taxation and assessment by the Territory of Montana." * * *

The second cause of action describes certain lots and
54 blocks in the town of Moreland, county aforesaid, and contains the following allegations: "That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county; that said assessor did not assess said lots and blocks of land, as required by law, and did not determine and fix the true value of such lots and blocks and enter or cause to be entered the same opposite such lots and blocks, as required by law, but assessed and valued all of said lots and blocks together as one parcel of land; that said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place upon said assessment-roll the valuations of said lots and blocks as returned by said plaintiff; but said assessor did wrongfully and falsely take and subscribe an oath, and attach the same to the said assessment-roll, wherein and whereby said assessor did swear that the value of said property was returned in said assessment-roll as set forth in said statement made and returned to said assessor by said plaintiff."

The third cause of action relates to certain lots and blocks of land in the town of Gallatin, county aforesaid, which are described in Schedule "C."

The other allegations are similar to those which have been recited respecting the second cause of action.

It is also alleged that the county treasurer, the respondent, has advertised the foregoing lands, blocks, and lots for sale through the failure of the appellant to pay said taxes.

55 A demurrer to each cause of action was sustained by the court below, and judgment was afterwards entered against the plaintiff.

The statute which was in force when the assessments that are complained of were made provides as follows:

"SEC. 22. The board of county commissioners of each county shall constitute a board for the correction of the assessment-roll and the equalization of the assessed value of property, and on the third

Monday in the month of September, of each year, said board shall meet at the office of the county clerk, at the county-seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said board shall be given by the county clerk by publication for at least two successive weeks, in a newspaper published in said county, if there be one, otherwise by notices posted in five public places immediately prior to the meeting of said board of equalization; but no notice of an adjourned meeting of said board shall be required.

Any person feeling aggrieved by any valuation, or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof, and if, in the opinion of said board, any valuation is too high or too low, as compared with other valuations, by the assessor, of similar classes of property, it may equalize the same; but if such valuation results in any increase, the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid." Sts. 15th Ex. Sess., p. 92.

56 It appears from the transcript that the plaintiff elected to stand upon its complaint and declined to amend the same when the demurrers were sustained.

We must assume that every fact which is material to its demand for equitable relief has been pleaded.

It is clearly shown that the appellant never applied to the board of equalization created by the statute for any redress or sought any remedy until this action was commenced, February 17th, 1890.

The brief of the appellant considers the propositions relating to the lots and blocks in the towns of Moreland and Gallatin, and says:

"It is conceded by the company that these lands are not exempt from taxation, and the sole question arising with reference to each is whether the defects in the levy of the taxes are such as to render the taxes void and entitle the plaintiff to the relief prayed for." The complaint does not allege that the appellant has paid or tendered any sum of money to meet its liability to taxation upon the property to which the title is admitted.

The discussion has embraced matters of national as well as local importance concerning the effect of the act of Congress incorporating the appellant and the ownership of the lands mentioned in Schedule "A," but we do not express an opinion thereon.

57 The determination of one inquiry regarding the sufficiency of the complaint restricts this investigation.

In National Bank *vs.* Kimball, 103 U. S., 732, Mr. Justice Miller says: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until

the precise amount which he ought to pay is ascertained by a court of equity, and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of the Government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be, but that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay and contest and delay only the remainder. State Railroad Tax Cases, 92 U. S., 575.

This bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid."

The case of Northern Pacific Railroad *v.* Garland, 5 Mont., 146, was brought by the plaintiff in this action to restrain the
58 county treasurer of Custer county from collecting a tax which had been assessed upon "twenty miles of railroad and rolling stock."

The complaint conformed to the doctrine of National Bank *vs.* Kimball, *supra*, and alleged that the tax upon the personal property of the corporation had been paid, and "that the plaintiff before the commencement of this action appraised at its true value the rolling stock on said twenty miles of road, and has tendered to the defendant the taxes thereon, amounting to the sum of $440, and brings the money into court." P. 153.

Upon this ground alone we can sustain the ruling of the court below upon the demurrer to the second and third causes of action.

If we concede the position of the appellant that the lands which are described in the Schedule "A" are not subject to taxation, and that it cannot be required to pay or tender any sum of money in payment *in payment* of any tax thereon, we assert that the statute, *supra*, has prescribed an ample legal remedy, which must be exhausted before the equitable powers of the court are resorted to.

We have seen that no action of this nature has been had before the board of equalization of the county of Gallatin, and this statutory proceeding has been ignored.

A reference to the authorities leads to the conclusion that this conduct of the appellant compels us to decide adversely to its appeal.

In Dundee M. T. I. Co. *v.* Charlton, 13 Saw., 25, Mr. Justice
59 Deedy said: "But on the hearing the defendant made the objection that, conceding the error and injustice of the assessor, the remedy of the plaintiff in the first instance was an appeal to the county board of equalization to correct the same, and that unless it appears that it has resorted to this means of redress without avail it cannot have relief in a court of equity. * * * But the plaintiff, having neglected to avail itself of this means of redress, cannot maintain a suit for relief in this court. It is no excuse for this neglect that the board of equalization as well as the assessor were committed to the rule of taxing mortgages, which were generally owned by non-residents, at their face or cash value, and the

property in lands, which generally belonged to residents of the county, at much less than such value.

Notwithstanding this it was the duty of the plaintiff, if dissatisfied with the assessment, to pursue the mode prescribed by the statute relating to assessments for its correction, when, if it failed, it might have taken the matter before the circuit court of the State on a writ of review (Rhea *v.* Umatilla Co., 2 Or., 298) or brought this suit to restrain the county from collecting the illegal portion of the tax."

In Bourne *v.* Boston, 2 Gray, 494, Mr. Justice Bigelow says: "The plaintiff was not legally taxable for the property held by him as trustee, but he was taxable for the property of his ward in the city of Boston, and therefore a portion of the tax which in this action he seeks to recover back was rightly assessed to him. This would seem to bring the case within the principle, now well settled by the authorities, that where a person is liable to taxation for
60 personal and real estate in a town or city his sole remedy for an over-taxation caused by an excessive valuation of his property or by including in the assessment property of which he is not the owner or for which he is not liable to taxation is by an application to the assessors for an abatement."

In Rio Grande R. Co. *v.* Scanlan, 44 Texas, 649, Mr. Justice Moore in the opinion says: "But if the law was in force and appellant's property was being assessed under it, from the petition it does not appear that the appellant had taken the proper steps to secure a correction of the assessment, if it was erroneous or excessive, or had placed itself in the proper attitude to ask the interposition of a court of equity for relief if it was in danger of suffering injury therefrom.

Although the tax may have been illegally assessed and the action of the sheriff in collecting it unauthorized, it does not follow that a court of equity will in all instances interpose to stay his action. A party asking for this extraordinary relief must have used all the proper means to obviate the necessity of appealing to the court, and must not himself be in default."

In O'Neal *v.* Va. & Md. B. Co., 18 Md., 1, the court say: "The ground of equity is that the property is not taxable at all, and that the assessment had not been made and returned according to law. * * * The answer shows that they had knowledge of the assessment, and no reason is assigned for their not going before the commissioners to have the supposed errors corrected. * * *
61 We have no power to make the correction for the benefit of the public, which the commissioners might have done, and if the courts of equity were to interfere in such cases parties taxed, instead of going before the proper tribunal to have errors corrected, and thereby, whilst protecting themselves, secure to the State or county their just demands against the property, would wait until the time had elapsed, and then, by proceeding in equity, escape altogether."

Mr. High in his work on injunctions says:

"The fundamental principle applicable to such cases is that a court of equity is not a court of errors to review the acts of public

officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly. Where, therefore, a particular manner is provided by law or a particular tribunal is designated for the settlement and decision of all errors or irregularities on behalf of persons dissatisfied with a tax they must avail themselves of the legal remedies thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax, and this upon the ground that where one has a complete and ample remedy at law and slumbers upon his rights he is estopped from invoking the aid of equity. Vol. 1 (2nd ed.), par. 493, and cases cited. See also Stanley *v.* Supervisors, 121 U. S., 535; Palmer *v.* McMahon, 133 U. S., 660; Merrill *v.* Gorham, 6 Cal.; 41; Oregon & W. M. S. Bank *v.* Jordan, 16 Or., 113; Stewart *v.* Maple, 70 Pa. St., 221; Brooks *v.* Shelton, 47 Miss., 243; Davis *v.* Macy, 124 Mass., 193; Preston *v.* Johnson, 104 Ill., 625; Tripp *v.* Merchants' Mf. I. Co., 12 R. I., 435; Cooley on Taxation, par. 527–'29; 2 Desty on Taxation, par. 661–'3.

In Northern Pacific Railroad *v.* Garland, *supra*, it is stated that the corporation "applied to the board of county commis-
62 sioners of said county, at their December session, 1881, to remit the tax" complained of, "which the board refused to do." It is apparent that the complaint in that case contained the allegations which are necessary and proper according to the principles laid down in the authorities *supra*, and therefore this court held that the appellant was entitled to the equitable remedy which was prayed for; and it is equally clear that the case at bar does not fall within the doctrine which has been upheld, and that the complaint lacks the essential averments which require courts to interpose the writ of injunction. The judgment is therefore affirmed with costs.

HENRY N. BLAKE,
Chief Justice.

We concur.

E. N. HARWOOD,
Associate Justice.

WILLIAM H. DE WITT,
Associate Justice.

63 To the Hon. John M. Harlan, associate justice of the Supreme Court of the United States:

The petition of the Northern Pacific Railroad Company, by its attorneys, respectfully showeth—

That the petitioner filed in the district court of the sixth judicial district of the State of Montana within and for the county of Gallatin the following bill of complaint, to wit:

64 In the District Court of the Sixth Judicial District of the State of Montana within and for the County of Gallatin.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana, Defendant.

65 Said plaintiff, for cause of action herein, complains and alleges:

I.

That the Northern Pacific Railroad Company is a corporation created and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and resolutions supplementary thereto and amendatory thereof, and was and is thereby authorized and empowered to build, construct, and operate a railroad and telegraph line from Lake Superior to Puget sound, as therein specified.

66 II.

That by the third section of said act of Congress of July 2nd, 1864, it was, among other things, enacted as follows, to wit:

"SEC. 3. And be it further enacted, That there be, and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd
67 numbers, not more than ten miles beyond the limits of said alternate sections; Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which, lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of

land heretofore granted shall be deducted from the amount granted by this act; Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate confederate and associate with said company upon the terms named in the first section of this act; Provided further, that all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections, nearest to the line of said road, may be selected as above provided; and provided further, that the word 'mineral,' when it occurs in this act shall not be held to include iron or coal."

That by the fourth section of said act it was, among other things, enacted as follows:

"And be it further enacted, That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in good, substantial and workmanlike
68 manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States and patents of land as aforesaid, shall be issued to said company, confirming to said company the right and title to said land situated opposite to, and coterminous with said completed section of said road; and from time to time whenever twenty additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid; Provided, that not more than ten sections of land per mile as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, — a first-class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act."

69 III.

That under and in pursuance of the said several acts and joint resolutions of Congress the plaintiff has heretofore definitely fixed the line of said road extending from the waters of Lake Superior to Puget sound, on the Pacific coast, and duly filed a plat thereof in the office of the Commissioner of the General Land Office; that the same has been accepted and approved by the Secretary of the Interior and the said Commissioner of the General Land Office, and that plaintiff has further under and in pursuance of the several acts and

joint resolutions of Congress built and caused to be built and put into operation along the said line of definite location so fixed as aforesaid a continuous line of railroad and telegraph extending from the said waters of Lake Superior westwardly to Puget sound, on the Pacific coast, and of the character and material specified in said act- and joint resolutions.

That the President of the United States has caused said road so constructed as aforesaid to be examined and has accepted and approved the same, as required by said act.

IV.

That the lands described in the schedule marked Schedule "A," hereunto annexed (which schedule and the statement contained therein are hereby made a part of this complaint), and all of the same are situated on and within the distance of forty miles of the plaintiff's said line of railroad, as the same was so definitely fixed and described in the plat thereof duly filed with the Commissioner of the General Land Office as aforesaid, and that said lands are in the county of Gallatin, Montana.

70 V.

That the Secretary of the Interior, construing said 3rd section of the act of Congress of July 2nd, 1864, construes the phrase therein contained, "lands free from pre-emption or other claims or rights," to mean only such lands as were at the date of filing said map of definite location as aforesaid free from settlement by a duly qualified pre-emptor or homesteader, whether a filing had been made upon said lands or an entry thereof made or not and wheth-r said settler subsequently abandoned said land or remained in possession thereof and sought to acquire title thereto.

VI.

That the lands so granted to said plaintiff by the acts and joint resolutions aforesaid, if any there are in said county, have never been segregated from the public lands, have never been identified, and that the boundaries of the specific lands in said county so granted to complainant as aforesaid, if any there are, have never been ascertained or determined.

VII.

That neither said lands described in said schedule nor any lands in said county have ever been certified or patented to the plaintiff, and neither the Government of the United States nor any of its officers or agents have ever determined or ascertained what specific lands, if any, passed to said plaintiff by virtue of said grant, although the said plaintiff has repeatedly asked and peti-
71 tioned the said United States and its officers, to wit, the Commissioner of the General Land Office and the Secretary of the Interior, to determine the specific lands, if any there are, that inured to said plaintiff under and by virtue of said act of Congress

and the joint resolutions and subsequent acts of Congress relating to the same subject-matter; that said plaintiff has performed all the things and conditions upon its part to be done and performed to entitle the said plaintiff to the lands inuring to it under and by virtue of said grant.

VIII.

That the United States and its officers and agents, to wit, the Commissioner of the General Land Office and the Secretary of the Interior and the President of the United States, have failed and refused to certify said lands so described in said schedule under said grant to the plaintiff or to certify any lands in the county of Gallatin to said plaintiff, but have held and still hold the same suspended for the reason that it is claimed that said lands are mineral and are accepted from the grant to said plaintiff, and the said question as to whether the title to said lands passed to said plaontiff under and by virtue of said act and joint resolutions of Congress and the compliance therewith by said plaintiff is now in controversy and pending before the Commissioner of the General Land Office and the Secretary of the Interior undetermined.

IX.

That said plaintiff has not refunded to the United States the sum of money expended by the United States in surveying said
72 lands, and is unable to repay and refund to said United States the said money so expended until it is determined by the proper officers of the United States what specific lands inure to said plaintiff under and by virtue of said acts of Congress; but that said plaintiff is ready and willing and has been at all times so ready and willing, and has so informed the United States through its proper officers, to pay into the Treasury of the United States the cost of surveying and *and* conveying and all other fees required by law to entitle said plaintiff to patents to all lands that may inure to said plaintiff under and by virtue of said acts of Congress as soon as the same may be determined and ascertained, and that said plaintiff has paid into the Treasury of the United States as surveying fees for the lands within the limits of said grant a large sum of money, to wit, $149,408.72, which said lands the said United States has since refused and failed to certify or patent to said plaintiff, holding the same suspended by reason of a claim that said lands were mineral and were excepted from said grant, and that neither the said United States nor any of its officers or agents have made demand upon plaintiff for the surveying, conveying, and other fees upon the land described in the said schedule hereunto annexed, and that they have not refused or failed to certify or patent said lands to said plaintiff by reason of the failure of said plaintiff to pay such fees; but have refused and failed to certify or patent said lands solely because said lands have not been identified as lands passing to said plaintiff under said grant as hereinbefore alleged.

73 X.

That said plaintiff has no other right, title, claim, interest, property, or possession of, in, or to any of the lands or premises described in the said Schedule "A" or either of them except such rights, title, claim, interest, property, or possession, now unknown and uncertain, as said plaintiff may have obtained or secured under and by virtue of the said act of Congress approved July 2nd, 1864, and the subsequent acts and joint resolutions amendatory thereof and supplementary thereto.

XI.

In the year 1889 the officers of the said county of Gallatin, authorized by the laws of the Territory of Montana to assess property therein for purposes of taxation and to levy taxes thereon, pretended to assess all the said parcels of land described in the Schedule "A," hereunto annexed, to the said plaintiff for the purposes of taxation and pretended to levy certain taxes thereon, to wit, the territorial, county, town, and other taxes for that year, amounting in the aggregate to — dollars.

XII.

That all the said contended taxes were and are illegal and void for the reason that said lands so taxed were exempt from assessment and taxation by the Territory of Montana because of the facts hereinbefore stated.

74 XIII.

That, in addition to the fact that said pretended taxes are wholly unauthorized, illegal, and void, they county treasurer has not given the proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth; that said Schedule "A," hereunto annexed, is a copy of the description of lands as published by said treasurer in said notice; that said notice does not contain the amount of said tax, the amount of the penalty, the cost of publication, or the total amount of the tax, penalty, and cost of publication, as required by law.

XIV.

That, notwithstanding the premises, the defendant, The County Treasurer of said County, has advertised said land described in said Schedule "A," hereunto annexed, and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with penalties and costs, on the 17th day of February, 1890, at his office in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such lands and the value thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned, and whereby a cloud will be cast upon the title to said lands.

And for the second cause of action against said defendant said plaintiff complains and alleges:

75 I.

That said plaintiff is a corporation created and existing as alleged in the first paragraph of the first cause of action herein.

II.

That said plaintiff is the owner of and entitled to those certain lots and blocks of land in the town of Moreland, county and State aforesaid, described in Schedule "B," hereunto annexed and hereby made a part of this complaint.

III.

That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county.

IV.

That said assessor did not assess said lots and blocks of land, as required by law, and did not determine and fix the true value of such lots and blocks and enter and cause to be entered the same opposite such lots and blocks, as required by law, but assessed and valued all of said lots and blocks together as one parcel of land.

V.

That said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place upon said assessment-roll the valuations of said lots and blocks as returned by said plaintiff, but said assessor did wrongfully and falsely take and subscribe an oath and attach the same to the said assessment-roll, wherein and whereby said assessor did swear
76 that the value of said property was returned in said assessment-roll as set forth in said statement made and returned to said assessor by said plaintiff.

VI.

That the county clerk of said county did not make out a tax-list, as required by law, setting forth the amount of each different tax upon said lots and blocks or containing a separate valuation of said parcels of land.

VII.

That the said county treasurer has not given the proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth, in this, that said notice does not state the tax due on each parcel of said lands nor the total tax due on each of said parcels after adding penalty and cost of advertising; but the Schedule "B," hereunto annexed, is a copy of said notice as published by said treasurer.

VIII.

Notwithstanding the premises, the defendant, The County Treasurer of said County, has advertised the said lands described in said Schedule " B " and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with interest and costs, on the 17th day of February, A. D. 1890, at his office at the court-house, in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such lands and the value
77 thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned and whereby a cloud will be cast upon the title to said lands.

And for a third cause of action against said defendant said plaintiff complains and alleges:

I.

That said plaintiff is a corporation created and existing as alleged in the first paragraph of the first cause of action herein.

II.

That said plaintiff is the owner of and entitled to those certain lots and blocks of land in the town of Gallatin, county and State aforesaid, described in Schedule " C," hereunto annexed and hereby made a part of this complaint.

III.

That prior to the first Monday in August, A. D. 1889, said plaintiff furnished a list of said lots under oath, as required by law, to the assessor of said Gallatin county.

IV.

That said assessor did not assess said lots and blocks of land separately, as required by law, and did not determine and fix the true value of such lots and blocks and enter or cause to be entered the same opposite such lots and blocks on the assessment-roll, as required by law.

78 V.

That said assessor did not assess said lands at the valuation returned by said plaintiff, but increased the same, and did not place upon said assessment-roll the valuations of said lots and blocks as returned by said plaintiff, but said assessor did wrongfully and falsely take and subscribe an oath and attach the same to the said assessment-roll, wherein and whereby said assessor did swear that the value of said property was returned in said assessment-roll as set forth in said statement made and returned to said assessor by said plaintiff.

VI.

That the county clerk of said county did not make out a tax-list, as required by law, setting forth the amount of each different tax upon said lots and blocks — containing a separate valuation of said separate parcels of land.

VII.

That the said county treasurer has not given proper notice to acquire jurisdiction to make the threatened sale hereinafter set forth in this, that said notice does not state the tax due on each parcel of said land nor the total tax due on each of said parcels after adding penalty and cost of advertising, but that Schedule "C," hereunto annexed, is a copy of said notice as published by said treasurer.

79 VIII.

That notwithstanding the premises the county treasurer of said county has advertised the said lots and blocks described in said Schedule "C" and threatens and is about to wrongfully sell the same for the non-payment of said plaintiff's taxes claimed to be delinquent, with interests and costs, on the 17th day of February, A. D. 1890, at his office, at the court-house, in the city of Bozeman, county of Gallatin, Montana, and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to such land and the value thereof will be greatly impaired and a multiplicity of suits concerning the title to said lands necessarily occasioned, and whereby a cloud will be cast upon the title to said lands.

Wherefore plaintiff prays that the defendant, The County Treasurer of said County, and his deputy and deputies and his successor and successors in office be forever restrained from selling said lands, blocks, and lots, or any portion thereof for said pretended taxes and from executing any tax certificate or certificates therefor to any person, natural or corporate, and that he be forever restrained from collecting or attempting to collect said taxes, and that said taxes and tax proceedings be declared void and be set aside and cancelled; that a preliminary injunction order restraining said sale forthwith issue, and that plaintiff may have such other and further relief as the court may deem equitable and just in the premises and its costs and disbursements herein.

CULLEN & SANDERS AND
ARMSTRONG & HARTMAN,
Att'ys for Plaintiff.

80 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

F. M. Dudley, being first duly sworn, deposes and says that the plaintiff in the above-entitled action is a corporation, and that he is an officer thereof, to wit, land attorney and tax commissioner, and

that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge.

F. M. DUDLEY.

Subscribed and sworn to before me this 12th day of February, 1890.

JAMES U. SANDERS,
Notary Public.

81 SCHEDULE "A."

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	1	1 S.	1 E.	636
"	Do.	3	"	"	637
"	E. ½, E. ½ N. W. ¼, S. W. ¼ N. W. ¼, S. W. ¼	5	"	"	598
"	S. E. ¼ N. E. ¼, W. ½, S. E. ¼ S. E. ¼, W. ½ S. E. —	7	"	"	452
"	All	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	E. ½ of S. W. ¼	19	"	"	469
"	All	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Lot 9	5	1 N.	"	16.65
"	All	13	"	"	640
"	Do.	15	"	"	640
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. ½, E. ½ S. W. ¼, S. E. ¼	29	"	"	560
"	W. ½	31	"	"	352
82					
N. P. R. R. Co.	All	33	1 N.	1 E.	640
"	Do.	35	"	"	640
"	Do.	1	1 S.	2 E.	633.90
"	E. ½ of N. W. ¼	3	"	"	513.74
"	All	7	"	"	613.48
"	S. W. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	E. ½ of S. W. ¼	15	"	"	480
"	N. W. ¼	17	"	"	160
"	All	19	"	"	613.96
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. E. ¼ and S. W. ¼	29	"	"	320
"	All	31	"	"	614
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Do.	1	1 N.	2 E.	634.47

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	3	1 N.	2 E.	641
"	Do.	7	"	"	644
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	S. E. ¼	15	"	"	160
"	N. E. ¼ N. E. ¼, W. ½ N. E. ¼, W. ½, W. ½ S. E. ¼, S. E. ¼ S. E. ¼	17	"	"	560
"	All	19	"	"	640
"	Do.	23	"	"	640
83 "	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. W. ¼, W. ½ S. W. ¼	29	"	"	240
"	All	31	"	"	640
"	Do.	35	"	"	640
"	Do.	1	2 N.	2 E.	646
"	E. ½, E. ½ S.W. ¼, l'ts 3, 7, 8, 9, less W. R.	3	2 N.	2 E.	481
"	S. E. ¼ N. E. ¼, N. E. ¼ S. W. ¼, N. ½ S. E. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	E. ½, E. ½ N.W. ¼, S.W. ¼ S. W. ¼, less 8 acres	15	"	"	472
"	E. ½ S. W. ¼, S. W. ¼ S. W. ¼	17	"	"	120
"	E. ½ E. ½, W. ½, N. W. ¼ N. W. ¼	23	"	"	520
"	All	25	"	"	640
"	W. ½ S. W. ¼, S. E. ¼ N. W. ¼	27	"	"	120
"	S. ½ N. E. ¼, N. W. ¼ N. E. ¼, N. E. ¼ N. W. ¼	29	"	"	160
"	E. ½ N. E. ¼, W. ½, S. E. ¼	33	"	"	560
"	All, less R. W. 26 acres	35	"	"	614
"	Lots 2, 4, 5, less R. of W. 31 acres	23	3 N.	"	36.38
"	All	25	"	"	640
"	E. ½ E. ½, lots 1, 4, 6, 7	27	"	"	332
"	All	35	"	"	640
"	W. ½ N. W. ¼, S. W. ¼, W. ½ S. E. ¼, E. ½ N. E. ¼	1	1 S.	3 E.	399.65
"	All	3	"	"	631.44
"	Do.	5	"	"	628.96
"	Do.	7	"	"	613.60
84 "	Do.	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	615.60
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	640
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	S. W. ¼	1	1 N.	3 E.	160
"	All	7	"	"	642.62
"	Do.	17	"	"	640
"	Do.	19	"	"	641.60
"	Do.	21	"	"	640
"	W. ½ E. ½, W. ½	27	"	"	480

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	29	1 N.	3 E.	640
"	Do.	31	"	"	640.60
"	Do.	33	"	"	640
"	Do.	1	2 N.	3 E.	639.84
"	Do.	3	"	"	640.80
"	Do.	5	"	"	641.64
"	Do.	7	"	"	609.76
"	Do.	9	"	"	640
"	Do.	11	"	"	640
85 "	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	613.84
"	Do.	21	"	"	640
"	Do.	33	"	"	640
"	N. ½, N. ½ S. ½, S. E. ¼ S. E. ¼	27	"	"	520
"	All.	29	"	"	640
"	N. W. ¼, N. W. ¼ S. E. ¼	33	"	"	200
"	All	5	3 N.	3 E.	635.94
"	Do.	9	"	"	640
"	Do.	17	"	"	640
"	Do.	19	"	"	625
"	Do.	21	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	619.47
"	Do.	33	"	"	640
"	Do.	17	4 N.	"	640
"	Do.	21	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	621.66
"	Do.	33	"	"	640
"	Do.	5	3 S.	4 E.	642
"	Do.	7	"	"	616.84
"	W. ½ N. W. ¼, S. W. ¼	9	"	"	240
"	All	17	"	"	650
"	S. ½ S. E. ¼, N. E. ¼ S. E. ¼	27	"	"	120
"	All	31	"	"	627.84
"	N. ½ N. E. ¼, S. W. ¼ N. E. ¼, N. W. ¼ S. E. ¼	33	"	"	160
86 "	N. W. ¼ N. W. ¼	35	3 S.	4 E.	40
"	All	5	2 S.	"	635.24
"	Do.	7	"	"	621.76
"	Do.	9	"	"	640
"	E. ½ E. ½	11	"	"	160
"	E. ½	13	"	"	320
"	S. W. ¼ N. E. ¼, N. E. ¼ S W. ¼	23	"	"	280
"	All	29	"	"	640
"	Do.	31	"	"	616.08
"	E. ½, S. W. ¼	33	"	"	480
"	N. ½	1	1 S.	"	287.18
"	All	3	"	"	640.68
"	S. E. ¼ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ S. W. ¼, S. E. ¼	5	"	"	318.61
"	All	7	"	"	617.52
"	N. ½, W. ½ S. W. ¼, N. E. ¼ S. E. ¼	9	"	"	440
"	All	11	"	"	640
"	Do.	13	"	"	640
"	N. E. ¼, N. E. ¼ N. W. ¼	15	"	"	200
"	N. W. ¼, N. ½ S. E. ¼, S. ½ N. E. ¼	17	"	"	320
"	All	19	"	"	624.48

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	N. ½, S. W. ¼, N. W. ¼ S. E. ¼	25	1 S.	4 E.	520
"	W. ½ N. W. ¼, S. E. ¼ N. W. ¼	27	"	"	120
"	All	31	"	"	621.92
"	N. ½, N. E. ¼ S. W. ¼, N. ½ S. E. ¼, S. E. ¼ S. E. ¼	1	1 N.	4 E.	481.02
"	N. ½ N. W. ¼	3	"	"	81.40
"	E. ½ N. E. ¼	31	"	"	80
"	E. ½, E. ½ N. W. ¼, S. W. ¼, less 18 acres	33	"	"	541.82
87 "	All, less 2 acres	35	1 N.	4 E.	638
"	W. ½	1	2 N.	4 E.	318.52
"	All	15	"	"	640
"	S. ½	13	"	"	320
"	W. ½, W. ½ N. E. ¼, N. W. ¼ S. E. ¼	23	"	"	440
"	All	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	N. ½ N. E. ¼, N. E. ¼ N. W. ¼	33	"	"	120
"	E. ½, E. ½ W. ½, S. W. ¼ S. W. ¼	35	"	"	520
"	All	1	3 N.	4 E.	637.96
"	S. E. ¼	3	"	"	160
"	S. E. ¼	9	"	"	160
"	All	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	540
"	S. E. ¼	17	"	"	160
"	S. E. ¼	19	"	"	160
"	All	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	664.88
"	Do.	33	"	"	640
"	Do.	35	"	"	640
"	Lot 1, N. W. ¼ S. W. ¼	5	2 S.	5 E.	78.77
"	W. ½ N. W. ¼	9	"	"	80
"	N. ½ S. E. ¼, S. E. ¼ S. W. ¼	11	"	"	120
88 "	S. W. ¼ S. W. ¼, S. E. ¼ S. W. ¼	13	2 S.	5 E.	80
"	N. W. ¼	15	"	"	160
"	E. ½ N. E. ¼, N. W. ¼ N. E. ¼	19	"	"	120
"	W. ½	21	"	"	320
"	S. E. ¼	31	"	"	148.47
"	E. ½	33	"	"	320
"	All, less 60 acres	7	1 S.	5 E.	554.24
"	W. ½ E. ½, W. ½	1	"	"	478.71
"	N. ½	11	"	"	320
"	S. E. ¼ N. E. ¼, S. W. ¼ S. E. ¼, E. ½ S. E. ¼, less 16 A.	17	"	"	244
"	W. ½ N. E. ¼, N. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ½	19	"	"	320
"	S. E. ¼ S. W. ¼	1	1 N.	5 E.	40
"	All	5	"	"	643.60
"	N. W. ¼	7	"	"	149.29
"	S. E. ¼ N. E. ¼	9	"	"	40
"	N. E. ¼ N. W. ¼	11	"	"	40
"	All	1	2 N.	5 E.	641.12
"	S. ½	7	"	"	318.16
"	N. ½ S. E. ¼, N. ½ S. W. 1 *w*	11	"	"	560
"	All	19	"	"	635.84

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	23	1 S.	4 E.	640
"	S. W. ¼, S. ½ N. E. ¼, N. ½ S. W. ¼	27	"	"	320
"	All	29	"	"	640
"	Do.	31	"	"	616.72
"	N. ½	33	"	"	320
"	All	7	3 N.	5 E.	632.08
"	Do.	17	3 S.	6 E.	640
"	Do.	19	"	"	625
"	Do.	21	"	"	640
89 "	All	1	2 S.	6 E.	640
"	Do.	3	"	"	640.18
"	E. ½, S. E. ¼ N. W. ¼	5	"	"	359.97
"	S. E. ¼ S. E. ¼	7	"	"	40
"	All	11	"	"	640
"	Do.	13	"	"	640
"	All, less 9 acres	25	"	"	630.50
"	All	29	"	"	640
"	S. W. ¼ S. W. ¼	5	1 S.	6 E.	40
"	N. ½, N. E. ¼ S. E. ¼	7	"	"	346.72
"	S. W. ¼ S. W. ¼	21	"	"	40
"	Lot 2	31	"	"	34.40
"	N. E. ¼	7	1 N.	6 E.	160
"	N. W. ¼, W. ½ S. W. ¼	21	"	"	240
"	All	3	2 S.	7 E.	633
"	S. W. ¼	7	"	"	155.24
"	S. E. ¼	9	"	"	160
"	All, less 50 acres	13	"	"	589.50
"	All	17	"	"	640
"	All, less 16.25 acres R. of W.	19	"	"	617.84
"	All, less 57 " "	21	"	"	583
"	All	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	N. E. ¼	29	"	"	160
"	All	35	"	"	640
"	All	1	1 S.	1 W.	641.67
"	Do.	3	"	"	639.54
"	Do.	5	"	"	636.05
90 "	All	9	1 S.	1 W.	640
"	Do.	11	"	"	640
"	N. ½, S. W. ¼	13	"	"	480
"	All	15	"	"	640
"	Do.	23	"	"	640
"	S. W. ¼, S. E. ¼, S. W. ¼ N. W. ¼	25	1 N.	1 W.	360
"	S. E. ¼, E. ½ S. W. ¼, S. W. ¼ S. W. ¼	33	"	"	280
"	N. W. ¼ N. E. ¼, W. ½, S. W. ¼ S. E. ¼, E. ½ S. E. ¼	35	"	"	480
"	All	1	3 N.	7 E.	641.24
"	All	3	"	"	642.44
"	Do.	9	"	"	640
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	S. ½	17	"	"	320
"	All	19	"	"	626.02
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	N. ½	27	"	"	320
"	All	29	"	"	640

Schedule "A"—Continued.

Name of owner.	Description.	Sec.	T.	R.	Acres.
N. P. R. R. Co.	All	33	3 N.	7 E.	640
"	Do.	35	"	"	640
"	Do.	1	4 N.	7 E.	979.08
"	Do.	3	"	"	983.04
"	Do.	11	"	"	640
"	Do.	13	"	"	640
"	Do.	15	"	"	640
"	Do.	23	"	"	640
91 "	All	25	4 N.	7 E.	640
"	Do.	27	"	"	640
"	Do.	35	"	"	640
"	Do.	19	5 N.	7 E.	639.68
"	Do.	21	"	"	640
"	Do.	23	"	"	640
"	Do.	25	"	"	640
"	Do.	27	"	"	640
"	Do.	29	"	"	640
"	Do.	31	"	"	640.38
"	Do.	33	"	"	640
"	Do.	35	"	"	640

92 "SCHEDULE B."

N. P. R. R. Co., Moreland; No. of lots, 300: Bl'k 1, lot 1; bl'k 3, lots 13, 14, and 15; bl'k 4, lots 1, 2, 3, 4, 11, 12, and 13; bl'k 5, lots 1, 2, 3, 4, 12, and p't 9, 10, and 11; bl'k 6, frac. lots 1 and 3; bl'k 7, frac. lots 1 and 3; bl'k 8, lots 9, 10, 11, 12, 22, 24, 13, 14, 15, 16, 21, and 23; bl'k 9, lots 9 to 16, inclusive, 25 to 32, inclusive; bl'k 10, lots 1 to 8, inclu., 17 to 24, inclu.; bl'k 11, lots 5 to 8, inclu., 17 to 24, inclu.; bl'k 12, lots 3, p't 4, 13, 14, 15, 16; bl'k 13, p't lot 6; bl'k 15, fract. 1, 2, 11, 12, 13; bl'k 16, 1 to 4, inclusive, 9 to 12, incl.; bl'k 17, lots 1 to 4, 9 to 12, incl.; bl'k 18, 1 to 6, 13, 14, 15, 18, 19, 20, and 21; bl'k 19, 1 to 6, 23 to 27, 13 to 17, incl.; bl'k 20, 1 to 6, 13 to 17, 23 to 27, incl.; bl'k 21, 1 to 6, 13 to 17, 26 to 27, incl.; bl'k 22, 5 to 8, 13 to 16; bl'k 23, 3 and 4, fractional; bl'k 24, fract. 6, 7, and 8; bl'k 25, 5 to 8, 13 to 16, incl.; bl'k 29, 5 to 18, 13 to 16, incl.; bl'k 30, 1 to 16; bl'k 31, 5 to 8, 13 to 16, incl.; bl'k 32, 5 to 8, 13 to 16, incl.; bl'k 33, fract. 11, 12, 13, 14; bl'k 34, 9 and 10; bl'k 35, 5 to 8, 13 to 16, incl.; bl'k 36, 1 to 16, incl.; bl'k 37, 5 to 18, 13 to 16, incl.; bl'k 38, 5 to 8, 13 to 16, incl.; bl'k 40, 5 to 8, 11, fract. 12 and 13; bl'k 41, lot 8; undivided ½ of unplatted triangular piec- of ground, containing 16.42 acres, situated in N. E. corner of N. E. ¼ sec. 10, T. 1 N., R. 3 E.; taxes, $43.44; dil. per cent., $4.34; pub., $4.34; total tax, $52.12.

93 SCHEDULE "C."

N. P. R. R. Co., Gallatin; No. of lots, —: Bl'k 1, lots 2 and 4; bl'k 2, lots 15 and 16; bl'k 3, 13 to 16, inclusive; bl'k 4, 5 to 8, 13 to 16, incl.; bl'k 5, 5 to 8, 13 to 16, incl.; bl'k 6, 5 to 8, 13 to 16, incl.; bl'k 7, 5 to 8, 13 to 16, incl.; bl'k 8, 5 to 8, 13 to 16, incl.; bl'k 9,

lots 1 and 2; bl'k 10, 5 to 8, incl.; bl'k 11, 5 to 8, 13 to 16, incl.; bl'k 12, 5 to 8, 13 to 16, incl.; bl'k 13, 5 to 8, 13 to 16, incl.; bl'k 14, 5 to 8, 17 to 24, incl.; bl'k 15, 1 to 8, 17 to 24, incl.; bl'k 16, 5 to 8, 17 to 24, incl.; bl'k 17, 5 to 8, 13 to 16, incl.; bl'k 18, 5 to 8, 13 to 16, incl.; bl'k 19, 3, 4, 7, and 8; bl'k 20, 1 to 5, incl.; bl'k 22, 3 to 8, incl.; bl'k 23, 5 to 8, 13 to 16, incl.; bl'k 24, 5 to 8, 13 to 16, incl.; bl'k 25, 5 to 8, 17 to 24, incl.; bl'k 27, 1 to 8, 17, 18, 19, 20, 21, 22, 25; bl'k 28, 5 to 8, 17 to 24, incl.; bl'k 29, 5 to 8, 13 to 16, incl.; bl'k 30, 9 to 14; bl'k 31, 9 and 11; bl'k 32, 5 to 8, 13 to 16, incl.; bl'k 33, 1 to 32, incl.; bl'k 34, 1, 5, 8, 11, 14, 15, 16; bl'k 35, 1 to 3, 13 to 24, incl.; bl'k 36, 5 to 8, 13 to 16, incl.; bl'k 37, 5 to 8, 13 to 16, incl.; bl'k 38, 5 to 8, 13 to 16, incl.; bl'k 41, 3 to 24, incl.; bl'k 42, 5 to 8, 13 to 15, incl.; ½ int. in N. E. ¼ N. W. ¼, S. ½ N. W. ¼, N. W. ¼ S. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ¼, N. E. ¼, N. ½ S. E. ¼ sec. 16, T. 2 N., R. 2 E., less R. of W.; tax, $20.08; dil. per cent., $2.00; pub., $2.00; total tax, $24.08.

94 And your petitioner further shows that upon the hearing and submission of the said cause the decision of the district court of the sixth judicial district of the State of Montana within and for the county of Gallatin was adverse to your petitioner, The Northern Pacific Railroad Company; whereupon your petitioner appealed from the decision of the said district court to the supreme court of the State of Montana, and, upon the hearing and submission of the cause in the supreme court of the State of Montana, the decision of the district court was affirmed.

Your petitioner says that there are errors in the proceedings and decision of the supreme court of the State of Montana, as shown by the record, and prays that a writ of error may be sued out to said supreme court by your honor for the purpose of bringing said case to the Supreme Court of the United States, in order that such error in the proceedings and decision may be reviewed and corrected.

And your petitioner will ever pray, &-, &-.

NORTHERN PACIFIC R. R. CO.,
By GARLAND & MAY, *Attorneys.*

Allowed.
JOHN M. HARLAN,
Associate Justice Sup. Ct U. S.

95 (Endorsed:) In the Supreme Court of the United States. Northern Pac. R. R. Co., plaintiffs in error, *vs.* J. L. Patterson, county treasurer of Gallatin Co., defendant in error. Petition. Filed Oct. 6th, 1890. W. J. Kennedy, clerk, by Geo. W. Sproule, deputy.

96 In the Supreme Court of the State of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
J. L. PATTERSON, County Treasure- of Gallatin County, Montana, Respondent.

Know all men by these presents that we, the Northern Pacific Railroad Company, a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, and those certain acts and joint resolutions supplementary thereto and amendatory thereof, by Newman Kline, its assistant general manager, and the St. Paul Title Insurance and Trust Company, a corporation created, organized, and existing under and by virtue of the laws of Minnesota, are held and firmly bound unto the above-named J. L. Patterson, count- treasurer of Gallatin county, Montana, —; for the payment of which, well and truly to be made, we bind ourselves and each of us and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named Northern Pacific Railroad Company has obtained a writ of error and a citation directed to said J. L. Patterson, county treasurer of Gallatin county, Montana, citing and admonishing him to be and appear at the term of the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, to show cause, if any there be,
97 why the decree rendered in the above-entitled action by the supreme court of the State of Montana on the first day of August, A. D. 1890, should not be reversed:

Now, therefore, the condition of this obligation is such that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the obligation to be void; else to remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By HERMAN KLINE,
Ass't to Gen'l Manager.

ST. PAUL TITLE INSURANCE & TRUST C-.,
By MAURICE AUERBACH, *Pres't.*

Attest: C. M. TAYLOR, *Sec.*

Signed, sealed, and delivered in presence of—
F. M. DUDLEY.
TEDIN R. SELMES.

Approved Oct. 1st, 1890.
JOHN M. HARLAN,
Asso. Justice Sup. C't U. S.

No. 700. *Acknowledgment by Corporation under Law of* 1883.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 23rd day of September, 1890, before me appeared Maurice Auerbach, to me personally known, who, being by me duly sworn, did say that he, Maurice Auerbach, and he, the said C. M. Taylor, is the president and secretary of the St. Paul Title Insurance and Trust Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said president and secretary acknowl-
98 edged said instrument to be the free act and deed of said corporation.

JOHN McKLEAN,
Notary Public, Ramsey County, Minn.

Approved Sept. 24th, 1890.
OSCAR B. HILLIS,
Clerk U. S. Circuit Court, Third Division,
[SEAL.] *District of Minnesota.*

(Endorsed:) In the Supreme Court of the United States. Northern Pacific R. R. Co., plaintiffs in error, *vs.* J. L. Patterson, county treasurer of Gallatin Co., defendant in error. Bond. Filed Oct. 6th, 1890. W. J. Kennedy, clerk, by Geo. W. Sproule, deputy.

99 Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana, Defendant in Error.

Assignment of Error.

Now comes said Northern Pacific Railroad Company, by its attorneys, and says that in the record and proceedings in the above cause there is a manifest error, in this, to wit:

I.

That the facts set forth and stated in the first cause of action alleged in the complaint herein are sufficient to and do constitute a cause of action.

II.

That the facts set forth and stated in the first cause of action alleged in said complaint are sufficient to and do show that the lands described in Schedule "A," annexed to said complaint, are not and have not been segregated from the public domain and are not and

nave not been identified as a portion of the lands granted to the plaintiff in error by the act of Congress approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a line of railroad and telegraph from Lake Superior to Puget sound, on the Pacific coast," and that said plaintiff in error has no other right, title, claim, interest, property, or possession in or to said lands except such as it may have obtained by virtue of said act of Congress.

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III.

That the facts set forth and stated in the said cause of action in said complaint alleged are sufficient to and do show that there is an existing claim that said lands described in said Schedule "A" are excepted from the grant to plaintiff in error, arising upon an alleged undetermined question of fact, and that said United States has never determined whether said lands are granted to and the property of said plaintiff in error or not.

IV.

That while said lands are not segregated from the public domain and are not identified by reason of an undetermined question of fact as a portion of the lands granted to said plaintiff in error by said act of Congress said lands are not taxable.

V.

That while the United States retains any interest in or title to said lands they are not taxable.

VI.

That while lands remain so public as to authorize the Interior Department of the United States to order hearings and take testimony for the purpose of ascertaining any fact necessary to determine whether the title thereto has passed from the United States or not said lands are not taxable.

VII.

That the sale of lands for taxes, if valid, deprives the United States of its right to determine whether the title thereto has passed from the United States to a grantee or not, and such sale is void if the United States has such right.

VIII.

101 That plaintiff in error was and is entitled to a writ of injunction enjoining the sale of said lands for taxes.

IX.

That it is not shown and does not appear that the plaintiff in error never applied to the board of equalization of Gallatin county for any redress or relief.

X.

That it was not the duty of the plaintiff in error to apply to said board of equalization for relief before seeking relief in a court of equity, said lands being exempt from taxation under the laws of the United States.

XI.

That section 22 of the act of the legislature of the Territory of Montana entitled "An act to provide for the levy of taxes and the assessment of property," approved September 14th, 1887, as construed by the supreme court of Montana herein, is in conflict with sections 1851 and 1907 of the Revised Statutes of the United States, section 4 of the act of Congress approved February 22nd, 1889, entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union upon an equal footing with the original States and to make donations of public lands to such States," and ordinance No. 1 adopted by the State of Montana in conformity therewith.

XII.

That the supreme court of Montana erred in not reversing the judgment of the district court for the sixth judicial district of *of* the State of Montana entered herein and overruling said demurrer.

102 Wherefore said Northern Pacific Railroad Company prays that the said judgment of the said supreme court of the State of Montana be reversed, and that said court be ordered to enter an order reversing the judgment entered herein and overruling said demurrer.

F. M. DUDLEY &
CULLEN, SANDERS & SHELTON,
Attorneys for Northern Pacific R. R. Co.

103 (Endorsed:) In the Supreme Court of the United States. Northern Pac. R. R. Co., plaintiffs in error, *vs.* J. L. Patterson, county treasurer of Gallatin Co., defendant in error. Assignment of error. Filed Nov'r 14th, 1890. W. J. Kennedy, clerk sup. c't of Montana.

104 In the Supreme Court of the State of Montana, *ss:*

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, do hereby certify the above and foregoing 103 pages to be a full, true, and complete transcript of the record of all the proceedings had in said court in the cause wherein The Northern Pacific Railroad Company is now the plaintiff in error and J. L. Patterson, county treasurer of Gallatin county, Montana, is the defendant in error, as the same appears from the files and records of said court now remaining in my custody and control (save and excepting the briefs filed in said cause).

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Helena, State of Montana, this 20th day of November, A. D. 1890.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of Montana.

105 Endorsed on cover: No. 45. In the supreme court of the State of Montana, July term, A. D. 1890. Northern Pacific Railroad Company, appellant, *vs.* J. L. Patterson, county treasurer of Gallatin Co., Montana, respondent. Cullen, Sanders and Shelton, Armstrong & Hartman, F. M. Dudley, counsel for appellant. H. J. Haskell, att'y general, counsel for respondent. Filed July 8th, 1890. W. J. Kennedy, clerk supreme court.

Endorsed on cover: Case No. 14,430. Montana supreme court. No. 988. The Northern Pacific Railroad Company, plaintiff in error, *vs.* J. L. Patterson, county treasurer of Gallatin county, Montana. Filed November, 28, 1890.

MAR 9 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

J. L. PATTERSON, County Treasurer of Gallatin County, Montana.

No. 988.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Motion to Advance the Case.

The plaintiff in error moves the court to advance this case, and set it down for hearing with, or immediately after, the case of Barden *et al. v.* The Northern Pacific Railroad Company, No. 1360, which was, on the motion of the plaintiff, on the 18th of January, 1892, advanced, and assigned for hearing on the second Monday of the next term; and for reasons in support of such motion it is shown:

The question directly presented in the *Barden* case (1360) is, whether the Northern Pacific Railroad Company is entitled to the lands within the limits of its grant, now known to be mineral, but which were not known to contain mineral at the date of definite location when the grant attached in favor of the company.

In this case large tracts of land in Gallatin County, Montana, which are within the limits of the grant to the Northern Pacific Railroad Company, have been listed in the name of the company for taxation, and, upon the non-payment of the taxes assessed, have been advertised for sale for such delinquent taxes as the property of the company. This suit was brought to enjoin such sale (Rec., 11, 12, 18, sched. A, B, C). The sole claim of the plaintiff in error to the lands described in the schedules is such as it has under the act of July 2, 1864 (Rec., 4, 5).

On account of the *mineral question* involved, these lands have not been segregated from the public domain, and identified, and made known as a part of the company's grant. Hence the question presented here is similar to the one in *Barden's* case (1360). The lands described, on account of the supposed mineral character, have never been ascertained or bounded as within its grant, or certified, or patented to the company; none of the lands of Gallatin County have passed to the company by virtue of its grant. The plaintiff in error has repeatedly petitioned the United States for a determination of its grant to the lands described, but there has always been a refusal to so certify the lands to the company, because there existed a controversy as to the character of the lands, and as to whether they are within the grant, and such controversy is now pending in the Department of the Interior.

From the above statement, and from the printed record, it will be seen that the mineral quality of the lands mentioned in this suit has not been determined, and the decision of the court in the *Barden* case (1360) will nearly, if not quite, determine all the questions in this case. Or, if this be not true, it is apparent the questions involved in the two cases are so nearly connected and allied, as to require settlement at the same time in the interest of such company and the public as well.

Besides, the question of the taxation of these lands is of itself of great public importance. Over sixteen and one-half millions of acres of lands have been surveyed and assessed to the Northern Pacific Railroad Company within the limits of its grant, none of which have been patented to the company.

Wherefore, etc.

A. H. GARLAND and
H. J. MAY,
For Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

NO. 357.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

J. L. PATTERSON, COUNTY TREASURER OF GALLATIN COUNTY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Statement, Assignment of Errors and Brief for Plaintiff in Error.

STATEMENT OF CASE.

The complaint herein sets out three separate and distinct causes of action. No Federal question however, is presented by the allegations of the second and third causes, and no error as to the ruling of the state court thereon, is here assigned. The decree of the su-

preme court of Montana with reference thereto is conceded to be final; and, it may be added, the taxes described in said causes were fully paid by the plaintiff in error in 1890. This statement, specification of errors and argument are accordingly confined to the first cause of action.

The first cause of action set out is the attempt by the defendant as county treasurer of Gallatin county, to sell certain lands for taxes levied thereon by the county officials authorized to levy taxes.

The plaintiff in error asserts an interest in the lands under the act of congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line, from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route;" but contends that the lands are not so segregated from the public domain and identified as a part of the lands granted by said act, as to extinguish all interest of the United States therein, and render them taxable. The grounds of this contention, as set out in the complaint, are: *

That a grant was made to the plaintiff by said act of July 2, 1864; that plaintiff definitely fixed the line of its road, and filed a plat thereof in the office of the commissioner of the gen-

* Record, 3-9 (7-18.)

eral land office; that the road was duly constructed and was accepted by the president. That the lands involved are on and within 40 miles of the line of the road as definitely fixed; and that the plaintiff has performed all the things and conditions upon its part to be done and performed to entitle it to the lands inuring to it under the grant; except that it has not repaid to the United States the cost of surveying these lands; that it is now, and has been at all times, ready and willing to pay such costs, and has so advised the United States, but is unable to repay such costs until the United States shall determine what lands are granted to it. That the lands have not been certified or patented to the plaintiff, and that the United States have failed and refused to certify said lands, or to certify any lands in Gallatin county to plaintiff, for the reason that it is claimed that said lands are mineral and are excepted from the grant, and that the question whether the title to said lands passed to complainant under said grant, and plaintiff's compliance therewith, is now in controversy and pending before the commissioner of the general land office and secretary of the interior. That this failure to certify or patent these lands is solely because of their non-identification as granted lands. That the lands granted by said act of congress to plaintiff in said county have never been segregated from

the public lands, or identified, aud the boundaries of the specific lands granted have never been ascertained or determined.

That the plaintiff has no other right, title, claim, interest, property or possession of, in or to said lands described in the complaint, than such right, title, claim, interest, property or possession, as it obtained under said act of July 2, 1864.

That in 1889, the county officers of Gallatin county assessed these lands to the plaintiff and proceeded to levy taxes thereon, and the defendant, the county treasurer, having advertised the same for sale in satisfaction of these taxes, is about to sell them.

To the complaint, filed February 17, 1890, in the district court for Gallatin county, setting out these facts, and that the sale would greatly impair the rights of the complainant in and to these lands, and cloud the plaintiff's title thereto, and cause a multiplicity of suits with reference to such title, the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. * This demurrer, after argument, was sustained; and the plaintiff electing to stand on its complaint, judgment was entered in favor of the defendant. † From this judgment the

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* Record, 18 (37).

† Record, 20-21 (43-45).

plaintiff appealed to the supreme court of the state. That court affirmed the judgment August 1, 1890. * No reasons for his action were assigned by the judge of the district court. The reasons assigned in the opinion of the supreme court for affirming the judgment were directed entirely to the proposition that, conceding the lands are not subject to taxation because of an interest of the United States therein, the plaintiff had an adequate remedy at law by applying to the county board of equalization for relief; and having failed so to do could not come into a court of equity, for relief. † To correct the errors alleged to exist in this judgment, the plaintiff has sued out this writ of error.

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* Record, 24 (51).
† Record 27 (58).

ASSIGNMENT OF ERRORS.

The plaintiff in error hereby assigns the following as errors committed by the supreme court of Montana, in the determination of this cause and the entry of the judgment herein.

I.

The court failed and declined to hold that the lands granted by the act of July 2, 1864, in said county, have never been segregated from the public lands, have never been identified, and the boundaries thereof have never been ascertained or determined; and failed and declined to hold that, by reason of these facts, they were not taxable.

II.

The court failed and declined to hold that there is an adverse claim that these lands were mineral in character and so excepted from the grant, and that whether or not the title thereof passed to the plaintiff under the grant is a question pending before the department, and that because of these facts said lands were not taxable.

III.

The court failed and declined to hold that the United States had such a potential interest in these lands as to render them non-taxable.

IV.

The court held that the plaintiff had an adequate remedy at law, by an application to the county board of equalization.

V.

The court held the facts set out in the first cause of action were not sufficient to constitute a cause of action.

VI.

The entry of an order affirming the order and judgment of the district court for the sixth judicial district of the state of Montana, within and for the county of Gallatin.

ARGUMENT.

POINT I.

THE LANDS DESCRIBED IN THE COMPLAINT ARE NOT FULLY IDENTIFIED AND ARE NOT FULLY SEGREGATED FROM THE PUBLIC DOMAIN, AND UNTIL THEY ARE FULLY DEFINED AND SEGREGATED FROM THE PUBLIC DOMAIN, THEY ARE NOT TAXABLE.

The sixth parapraph of the complaint alleges:

"That the lands so granted to said plaintiff * * * have never been segregated from the public lands, have never been identified, and the boundaries of the specific lands * * * so granted have never been ascertained or determined." *

The demurrer admits these averments, and they must be taken as true, unless, as a matter of law, it apppears that they are necessarily untrue. Whether or not they can be taken as true, must be determined by an analysis of the act making the grant.

The third section of the act of July 2, 1864, granting lands to the plaintiff, provides:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the extent of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any

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* Record 6 (13).

state, and whenever on the line thereof the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

For the lands excluded from the grant by virtue of these provisions, idemnity is provided.

That the act of July 2, 1864, makes a grant *in praesenti* is well settled. But as the very basis of our contention is found in the peculiar manner in which the title granted attaches itself to the particular tracts of land granted, I desire to direct attention to the language of this act. The words "there be, and hereby is, granted" to the company the sections designated, imply that the property itself is passed, not any special or limited interest in it. The title transferred is the legal, as distinguished from the equitable title. The words also import the transfer of a present title, not a promise to transfer one in the future. The act consequently vested in the grantee the legal title to the lands granted *eo instanti* July 2, 1864, subject to the performance of certain conditions subsequent. No specific lands, however, are described in the act, but means are provided for their future ascertainment; and, consequently, although the legal title to some lands, somewhere,

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* Record 6 (15.)

vested in the grantee July 2, 1864, it could not be said of any particular tract, it is the property of the railroad company. To perfect the grant it is necessary to ascertain and determine the particular tracts falling within the terms of the granting act, but as soon as any particular tract is ascertained to be within the terms of the granting act, it is then ascertained and determined that the railroad company has held the legal title to that specific piece of land ever since the second day of July, 1864. This I understand to be the meaning of a float grant *in praesenti* such as is made by the Northern Pacific act and similar legislation.

St. P. & P. R. Co. v. *N. P. R. Co.*, 139 U. S. 1, 5.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241, 247.

U. S. v. *S. P. R. Co.*, 146 U. S. 570, 593-4.

Curtner v. *U. S.*, 149 U. S. 662, 675.

Wis. Cen. R. Co. v. *Price Co.*, 133 U. S. 496, 509.

L. L. & G. R. Co. v. *U. S.*, 92 U. S. 733, 741.

Wineman v. *Gastrell*, 2 U. S. App. 449, 467.

The company has had, therefore, the legal title to some lands since the date of the grant, but that title is potential merely as to each tract, until the specific tract is ascertained to be within the grant. And admitting as the complaint does, that the line of the road has been definitely

fixed, the lands surveyed, and the grant fully earned, yet if for any reason the acts necessary to bring about these results do not determine conclusively with reference to any specific tract of land that that tract is the same as the land granted, in other words, identify it, the grantees' title to that specific tract is not perfect; it remains contingent; its interest is a potential one merely until the identification is made, or susceptible of being made from determined facts.

The lands granted by the act of July 2, 1864, are confined to the following:

1. To public lands on and within forty miles of the line of definite location of the road in the territories, and within twenty miles of such line in the states.

2. To the public lands included within odd numbered sections.

3. To the public lands to which the United States has full title, not reserved, sold, granted or otherwise appropriated at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

4. To the public lands that are free from pre-emption or other claims or rights at the time the line of said road is definitely fixed

and a plat thereof filed in the office of the commissioner of the general land office.

5. To the public lands that are not mineral.

The legal title to all lands falling within these conditions has been vested in the railroad company since July 2, 1864. But until it is determined by the proper authority, or is susceptible of ascertainment from known and settled facts, that a certain tract of land does fall within these conditions, that particular tract is not, and cannot, be shown or known to be granted; it is not identified as a portion of the grant. If the line of the road has not been fixed, or if the lands have not been surveyed, the lack of identity is at once apparent and will be conceded. But, since it is quite as essential that the lands shall be non-mineral, and shall be lands to which the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, to be granted, as it is that they should be odd numbered sections, or within the prescribed distance from the road, the determination of these questions, or their susceptibility of determination from known and settled facts, is quite as necessary for the identification of the lands as within the grant,

as is the definite location of the line of the road or a survey of the lands. If the line of the road has not been fixed, or the lands are unsurveyed, or there are adverse claims to the land, resting upon undetermined and undeterminable questions of fact, the lands cannot be fully identified as within the grant. The company cannot be said to be the absolute owner of the particular lands, for the grant, as far as each specific tract is concerned, remains a float, and the title is potential, until the facts necessary to determine if it be granted, are settled and known.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

Doe v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 118.

C. P. R. R. Co. v. *Howard*, 52 Cal. 227-31.

Curtner v. *U. S.*, 149 U. S. 662, 674.

Veeder v. *Guppy*, 3 Wis. 502, 525.

Kirby v. *Lewis*, 39 Fed. Rep. 66, 73.

Wright v. *Roseberry*, 121 U. S. 488, 509.

And if under any possible state of facts the lands under this grant can remain unidentified and unsegregated from the public lands after the line of the road is definitely fixed, the road constructed, and the lands surveyed, (which acts appear from the complaint to have been done in this case) that state of facts must, under the admitted allegations of the complaint, be assumed to exist here. We submit

that such failure of identification may arise from at least two causes; (1) Doubt whether the lands were free from pre-emption or other claims or rights at the date of the grant and of the definite location of the road; (2) Doubt as to the mineral character of the lands.

1. IS IT POSSIBLE, UNDER THE LAW, THAT THE QUESTION WHETHER A TRACT OF LAND WAS FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS AT THE DATE OF THE GRANT AND DEFINITE LOCATION, SHOULD BE IN DOUBT, UNDETERMINED AND UNDETERMINABLE?

If a claim or right sufficient to bring land within the exception can only be initiated by a proceeding in the proper land office, where it would become a matter of record and notice to the world, defining beyond controversy the land claimed, and attaching the claim thereto, the question must be answered in the negative. And it must be admitted that in *K. P. R'y Co.* v. *Dunmeyer*, 113 U. S. 629, this court apparently so decided.

The court says:

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, *by examining the plats of this land in the office of the register and receiver or in the general land office, it could readily have been seen if any of the odd sections within ten miles of the line had*

been sold or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted." Page 640.

Again:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but *it meant a proceeding in the proper land office* by which the inchoate right to the land was initiated." Page 644.

And when the courts have had occasion to touch this question they have uniformly announced a similar doctrine.

B. & M. R. Co. v. *Abink*, 14 Neb. 97; 15 N. W. Rep. 317.

W. P. R. Co. v. *Tevis*, 41 Cal. 489, 493.

S. P. R. Co. v. *Pursell*, (Cal.) 18 Pac. Rep. 886.

A. T. & S. F. R'y Co. v. *Mecklim*, 23 Kan. 167, 174.

I. R. R. L. Co. v. *Adkins*, 38 Ia. 351,354-5.

Kiteringham v. *Blair, etc.*, (Ia.) 35 N. W. Rep. 502, 503.

Cahalan v. *McTague*, 46 Fed. Rep. 251.

Water & Mining Co. v. *Bugbey*, 96 U. S. 165.

Brown v. *Corson*, (Or.) 19 Pac. Rep. 66, 70.

Buxton v. *Traver*, 130 U. S. 232.

In *N. P. R. R. Co.* v. *Walker*, 47 Fed. Rep. 681, the court says:

"The bill alleges * * * that at the date the line of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, the lands mentioned * * * were upon the records of the district land office, and of the office of the commissioner of the general land office, free from pre-emption or other claims or rights. * * * Assuming these averments to be true, the lands are within the terms of the grant and the title to them has vested in the company." p. 683.

Speaking of a similar averment, the circuit court of appeals for the ninth circuit said:

"It is specifically alleged in the bill * * * that the lands were free from pre-emption or other claims or rights."

N. P. R. R. Co. v. *Wright*, 54 Fed. Rep. 67, 69.

Such, however, is not the law as laid down by the interior department, upon which it acts in the adjustment of these grants, and by which it is governed in determining contests between settlers and the railroad companies. And for the purposes of this action we shall assume that the rule by which that department determines the company's claim to lands and patents—or refuses to patent—the same, is the law. According to the departmental construction of the phrase "free from pre-emption or other claims or rights," something more is required to determine the status of the lands than a mere reference to and examination of the records of the land office. The law, as there determined, is that occupation of land by a qualified entry-

man, existing at the date of the grant or at the date the map of definite location is filed, without a filing thereon or entry thereof, or any proceeding in the land office whatsoever, or any record evidence of its existence, is sufficient to bring the lands within the description of "not free from pre-emption or other claims or rights." *

Trepp v. *N. P. R. Co.*, 8 Copp's L. O. 181.
St. P. M. & M. R'y Co. v. *Gjuve*, 1 L. D. 331.
Emmerson v. *C. P. R. Co.*, 3 L. D. 117, 271.
T. & P. R. Co. v. *Gray*, 3 L. D. 253.
Pointard v. *C. P. R. Co.*, 4 L. D. 353.
Ramage v. *C. P. R. Co.*, 5 L. D. 274.
Brown v. *C. P. R. Co.*, 6 L. D. 151.
N. P. R. Co. v. *Bowman*, 7 L. D. 238.
N. P. R. Co. v. *Anrys*, 8 L. D. 362.
C. P. R. Co. v. *Shepherd*, 9 L. D. 213.
N. P. R. Co. v. *Anrys*, 10 L. D. 258.
N. P. R. Co. v. *Kerry*, 10 L. D. 290.
N. P. R. Co. v. *Potter*, 11 L. D. 531.
N. P. R. Co. v. *McCrimmon*, 12 L. D. 554.
Irvine v. *N. P. R. Co.*, 14 L. D. 362.
N. P. R. Co. v. *Patterson*, 16 L. D. 343.

In order that such settlement shall constitute a claim or right sufficient to exclude the land

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* Paragraph V of complaint. Record, 6 (13.)

from the grant, however, it is necessary that the settler be qualified to enter the land under the public land laws.

McComber v. *C. & O. R. Co.*, 2 Copp's L. O. 163.
Weber v. *W. P. R. Co.*, 6 Copp's L. O. 19.
Perkins v. *C. P. R. Co.*, 1 L. D. 336.
Emmerson v. *C. P. R. Co.*, 3 L. D. 271.
Ramage v. *C. P. R. Co.*, 5 L. D. 274.
C. P. R. Co. v. *Painter*, 6 L. D. 485.
N. P. R. Co. v. *Fitzgerald*, 7 L. D. 228.
C. P. R. Co. v. *Rees*, 10 L. D. 281.
Titamore v. *S. P. R. Co.*, 10 L. D. 463.
N. P. R. Co. v. *Potter*, 11 L. D. 531.
Stewart v. *N. P. R. Co.*, 11 L. D. 568.
N. P. R. Co. v. *McCrimmon*, 12 L. D. 554.
Irvine v. *N. P. R. Co.*, 14 L. D. 362.
N. P. R. Co. v. *Stark*, 15 L. D. 53.
Degenhart v. *N. P. R. Co.*, 15 L. D. 159.

The settler must not only be a qualified entryman, but he must have made his settlement with the intent to enter the land.

S. P. R. Co. v. *Lopez*, 3 L. D. 130.
Link v. *U. P. Ry. Co.*, 6 L. D. 322.
N. P. R. Co. v. *Dunham*, 11 L. D. 471.
N. P. R. Co. v. *Pile*, 12 L. D. 323.
Degenhart v. *N. P. R. Co.*, 15 L. D. 159.
Tetreault v. *N. P. R. Co.*, 15 L. D. 552.

But such settlement, even if made upon the date of the grant, or same day that the map of

definite location is filed, is sufficient to prevent the land passing under the grant.

St. P. M. & M. R'y Co. v. *Gjuve*, 1 L. D. 331.

N. P. R. Co. v. *Parker et at.*, 2 L. D. 569.

Mattson v. *St. P. M. M. Ry. Co.*, 5. L. D. 356.

N. P. R. Co. v. *Flaherty*, 8 L. D. 542.

And since the grant is *in praesenti*, and the time sharply fixed, to-wit: the dates of grant and of filing the map of definite location, when the existing status of the land must determine whether it is granted or not, the abandonment of the land by the settler at any time after those dates, does not restore the land to the grant, but restores it to the public domain of the United States.

Bardon v. *N. P. R. Co.*, 145 U. S. 535, 545.

L. L. & G. R. Co. v. *U. S.*, 92 U. S. 733, 749.

Newhall v. *Sanger*, 92 U. S. 761.

K. P. Ry. Co. v. *Dunmeyer*, 113 U. S. 640, 641.

Perkins v. *C. P. R. Co.*, 1 L. D. 336.

Ramage v. *C. P. R. Co.*, 5 L. D. 274.

C. P. R. Co. v. *Painter*, 6 L. D. 485.

N. P. R. Co. v. *Johnson*, 7 L. D. 357.

N. P. R. Co. v. *Flaherty*, 8 L. D. 542.

S. P. R. Co. v. *Brown*, 9 L. D. 173.

N. P. R. Co. v. *Kerry*, 10 L. D. 290.

In order, therefore, that a tract of land shall be free from pre-emption or other claims or rights so as to pass by the grant, it is necessary either that there should be no settler upon it at the dates of the grant and of definite location, or, if such settler was there, that he was not qualified to enter the same under the public land laws, or had no intention of so doing. And to identify a tract of land as within the grant, that is, to prove it to be the same with the lands granted by the act, it is essential that these facts, if such be the facts, with reference thereto, be shown, or at least be susceptible of being established before some competent tribunal whose decision thereon is conclusive as between the United States and the railroad company. The *facts* necessary to determine whether the lands were free from claims or rights actually exist, since the status of the lands at the dates of the grant and of definite location is a thing of the past. But are those facts susceptible of being definitely and finally established? Since it is the condition of the land at a definite date that is the test, a change in that condition the day following is immaterial; thus, if a qualified settler settled upon a tract of land the day preceding the date of the grant, twenty-nine years ago, or the date of the definite location of the road, lands, perhaps in the wilderness and unsurveyed, with the intention of making his home there and ultimately entering the lands under the public land laws,

an act and intention probably known only to himself, and resided there but two days and then abandoned the land, it would not be within the conditions prescribed in the grant and would not be granted. But there is no presumption of law, and certainly none of fact, that the railroad company has knowledge of these tl ings so as to know whether each particular tract was granted or not. It cannot be presumed to know of every settler on lands that were afterward shown to be odd numbered sections within the limits of the grant, who chanced to occupy such lands July 2, 1864, or at the date of the filing of the plat of definite location in the office of the commissioner of the general land office, and to know not only of his settlement, but also to know his qualifications for entering the lands, and his intentions with reference thereto. Such knowledge is an impossibility. And since knowledge of these things is necessary to knowledge of what lands are granted, it is not to be presumed that the railroad company has knowledge of what specific lands are granted, or can identify in the whole mass of odd numbered sections, the particular tracts to which it has title. Such knowledge is equally an impossibility in others. And since the title to all tracts that were not free from claims or rights remains in the United States, the government has, by virtue of its ownership of the greater or less number of unknown tracts scattered through the great mass of odd numbered

sections, which were not free from pre-emption or other claims or rights, a potential interest in the entire mass. Since the survey determined merely what are the odd numbered sections within the limits of the grant, but has not and cannot determine which of the odd numbered sections were free from claims or rights, the relationship of the government and the company to each other, with reference to these odd numbered sections, remains of the same nature that it was with respect to the entire mass of lands within the granted limits prior to survey. The survey is one step towards the identification, but since it fails to complete it, it does not alter the nature of the interest of the government in the lands. It may be claimed that the survey of the lands renders it possible, by pointing out what are odd numbered sections, to collect all the facts with reference to any particular tract and so determine whether it was free from claims or rights at the necessary dates. A moment's reflection will show this impossible. The greater portion of this land was a wilderness. It was unsurveyed. Hundreds of settlers were on it, of whose settlements no knowledge existed save in themselves; with their removal all evidence of their settlement vanished, save, perhaps, a mouldering cabin. What became of them, where they went, no man knew. What their intentions in making the settlements were, they alone could tell. If the lands were unsurveyed, what precise lands they

claimed, not even they could tell without a return to the lands and an examination of the survey lines. The records of the interior department conclusively establish that the evidence to prove a settlement, even where evidence be secured, is frequently, even generally, conflicting and obscure. The all important dates are forgotten, the witness is uncertain, is contradicted by equally positive and reliable witnesses. To determine these facts is a judicial function. This function cannot be performed by a private individual, without process and without the means of procuring the testimony of unwilling witnesses. Nor is it, by any law, made the duty of the railroad company to attempt to exercise this function and determine for itself, and at peril of having its lands sold, what was free from claims or rights years ago, and what was not.

Nor is there a forum in which the railroad company can proceed to have these questions finally determined with reference to specific lands, and so cut off the interest of the government therein. By the fourth section of the act of July 2, 1864, congress among other things provides:

"Sec. 4. *And be it further enacted*, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been

completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

Under this section it is clearly the duty of the officers authorized to issue patents, to ascertain, prior to the issuance of such patents, what portions of the lands coterminous with the completed sections of the road fall within the terms of description contained in the granting act, and, hence, are patentable.

Cowell v. *Lammers*, 21 Fed. Rep. 200, 205.

And this duty and consequent power to determine, as against the government, what lands are granted, is exclusive. The determination whether a specific tract passed under the grant to appellant, or whether it remains a part of the unappropriated public lands of the United States, requires the examination and construction of the acts of congress touching the public lands, and of the acts done and work of construction performed by appellant; and of the history of the particular tract of land; and the

performance of these duties is entrusted, by the act of congress, in the first instance, to the interior department; and the courts will not in any manner interfere with or seek to control in advance, and direct the action of that department in the performance of these duties. The courts have always refused to take jurisdiction of matters pending before the department, unless it be to protect private rights from being defeated and destroyed by the failure and neglect of the department to perform its duties.

S. C. & St. P. R. Co. v. *U. S.*, 34 Fed. Rep. 835, 837.

Chandler v. *C. & H. Min. Co.*, 149 U. S. 79, 88.

U. S. v. *Jones*, 131 U. S. 1.

Craig v. *Leitensdorfer*, 123 U. S. 189, 202.

S. C. & St. P. R. Co. v. *U. S.*, 36 Fed. Rep. 610, 612.

Aurora Hill M. Co. v. *85 Min. Co.*, 34 Fed. Rep. 515, 519.

Marquez v. *Frisbie*, 101 U. S. 473, 475.

Forbes v. *Driscoll*, 31 N. W. Rep. 633.

Litchfield v. *Register*, 9 Wall. 575, 578.

Wright v. *Roseberry*, 121 U. S. 488, 508.

Gaines v. *Thompson*, 7 Wall. 347.

The interior department in deciding these questions acts, not in an independent judicial capacity, empowered to decide the questions of fact necessary to determine whether the land

was granted or remains the property of the United States, as between contesting litigants, but acts as the agent of the government, authorized by it in the granting act to determine on behalf of the government what lands are of the description granted, and, when satisfied that a specific tract is of such description, to issue a quit claim deed, called a patent, certifying this fact on behalf of the government, thereby freeing the lands from the government's potential claim thereto; and in the absence of fraud and mistake of law, binding the government, its principal, and its privies, by that decision. The railroad company cannot compel this agent to act. It cannot institute proceedings in the interior department against the United States and obtain a decision upon these questions. And since, under the decisions last cited, the actions of this agent in determining what lands are granted, and issuing its certificate thereof, cannot be controlled by the courts, there is no forum in which, in the absence of action by the department, the railroad company can have questions as to what lands were free from claims or rights, finally determined as against the government so as to free said lands from the government's potential interest, and identify them as granted lands.

It is evident, from what has been said, that odd numbered sections within the limits of the grant, for which there were, at the dates of the grant

and of filing the map of definite location in the office of the commissioner of the general land office, are not necessarily lands so "free from preemption or other claims or rights," as to be a part of the granted lands. And since it is impossible for the railroad company or anyone else to know, or, in advance of action by the department, to conclusively ascertain what specific tracts were free from claims or rights at the dates of the grant and of the definite location of the road, or to ascertain further than as shown by the records of the land office, and as there is no forum whose duty it is, upon the application of the company, to determine these questions as between the railroad company and the government, so as to free the tracts from the government's potential interest, it must be admitted that not only is it possible that the question whether lands were free from claims or rights at the date of the grant or definite location, may be in doubt, undetermined and undeterminable, but in the great majority of instances, such must be the case.

Turning from an analysis of the necessary result of the departmental interpretation of the term "claims or rights," we find that the whole departmental practice in adjusting these land grants and determining whether lands are granted or not, a practice extending over a period of more than thirty years, is based and founded upon the proposition that the lands granted are not defined by a survey of the

lands and location and construction of the line of the road, but remain unsegregated from the public domain until patent or certification; and that the government retains, by reason thereof, an interest in the lands.

We have seen that under a grant like that to the Northern Pacific, the legal title vests in the grantee at the date of the granting act, and attaches to the specific tracts upon their identification as part of the lands granted. After that time the United States possesses no further interest therein. Now, there is no proposition of law better settled than that with the passage of the title and all interest in the land from the government, all jurisdiction of the interior department over the land and over the title conveyed, ceases. Its functions are confined to the public lands.

Noble v. *Union River Logging Co.*, 147 U. S. 165, 175.
Moore v. *Robbins*, 96 U. S. 530, 533.
U. S. v. *Schurz*, 102 U. S. 378, 402.
Curtner v. *U. S.*, 149 U. S. 662, 675-6.
Tubbs v. *Wilhoit*, 138 U. S. 134, 145-6.
Hardin v. *Jordan*, 140 U. S. 371, 400-1.

And it is immaterial whether the title passes by patent, or legislative grant—if it be of land with defined boundaries or capable of identification,—or by the attachment of a previously granted float title to a specific tract by its becoming defined with fixed boundaries or capable of identification.

Tubbs v. *Wilhoit*, 138 U. S. 134, 145.
Tubbs v. *Wilhoit*, 14 Pac. Rep. 361, 364.
Howell v. *Slauson*, (Cal.) 23 Pac. Rep. 692, 694.
Langdeau v. *Hanes*, 21 Wall. 521, 530.

And if the lands granted are identified by their survey and the fixing of the definite location of the road (which must be the time of identification, if identified prior to patent or certification), so that the title granted attaches to the specific sections, the duties of the interior department with reference thereto, and its jurisdiction thereover for any purpose whatsoever, save the ministerial duty of issuing patents as evidence of the title, necessarily terminates *eo instanti*. The department, however, asserts that it retains jurisdiction over such lands until patented or certified to the company, for the purpose of determining whether the lands were free from pre-emption or other claims or rights at the dates of the grant and definite location.

Says Secretary Noble:

"It is not questioned that the land department has jurisdiction until patent or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of', or was subject to a 'pre-emption or homestead claim' and therefore excepted from the grant. That such jurisdiction exists there can be no doubt."

C. P. R. Co. v. *Valentine*, 11 L. D. 238, 243.

And it is a matter of common knowledge that the department constantly exercises jurisdiction over the surveyed lands within this grant, and within similar grants, after the maps of definite location are filed, and the road completed; and orders hearings and takes testimony for the purpose of ascertaining facts to determine whether the specific tracts are granted. This has been the constant practice since the first railroad grant. It is the logical and necessary result of the departmental construction by which the term "claims or rights" is made to include settlements and acts, the only evidence of which must rest in the memory of the actors, or of such witnesses as there might be, acts of which there can be no record evidence. If such facts can be material, it was and is essential that the evidence thereof should be gathered and weighed by the officials charged with the duty of determining what lands are granted; and, as a necessary consequence of this construction, it becomes necessary for the department to take jurisdiction and order hearings to obtain this essential evidence. If the evidence is material, the jurisdiction to obtain it follows. And the claim and exercise of such jurisdiction is absolutely inconsistent with a theory that the lands are identified before certification or patent.

This court must, therefore, hold, either that the lands granted are not, as a matter of law, iden-

tified by the survey of the lands and the filing of the map of definite location, and concede that lands described in the complaint are not fully identified or segregated from the public domain; and that such lands are not defined as a portion of the grant; or hold that this constant practice of the interior department is pursued without authority of law; and that the hearings and decisions thereon are mere nullities, void and without effect.

2. IS IT POSSIBLE, UNDER THE LAW, THAT THE QUESTION WHETHER OR NOT LANDS ARE MINERAL, MAY, AFTER THE DEFINITE LOCATION AND CONSTRUCTION OF THE ROAD, REMAIN IN DOUBT, UNDETERMINED AND UNDETERMINABLE?

The answer to this question must be found in the definition of the term "mineral land." Three definitions of this term have been given:

First, it has been held by the courts that it means only those lands containing mineral in quantities sufficient to add to their richness and to justify expenditures for its extraction, and known to be so at the date of the grant.

Davis v. *Wiebbold*, 139 U. S. 507, 519.

N. P. R. Co. v. *Barden*, 46 Fed. Rep. 592, 594.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 620.

Francoeur v. *Newhouse*, 43 Fed. Rep. 236.

N. P. R. Co. v. *Walker*, 47 Fed. Rep. 681, 683-4.

Hunt v. *Steese*, (Cal.) 17 Pac. Rep. 920, 922.
N. P. R. Co. v. *Wright*, (C. C. A.) 54 Fed. Rep. 67, 69.

Second, That the term includes all lands which in fact contain mines, whether known or unknown; and that by reason of the exclusion of "mineral lands" from a grant like that to the Northern Pacific the title to no land passed to the grantee under the grant, which, *in fact*, contained mines secreted in its depths at the time the grant attached to the specific lands and became perfect, (or, rather, at the date of definite location; it could never become perfect under this construction,) though the existence of the mineral was then unknown and unsuspected, and there was nothing to indicate that any mine was there.

Speech of Senator Sanders, 21 Cong. Rec. 10964.

Third. That it is the known mineral condition of the land at the date of patent or certification that determines whether it is "mineral" or not.

C. P. R. Co. v. *Valentine*, 11 L. D. 238, 242.

N. P. R. Co. v. *Barden*, 46 Fed. Rep 592, 609, 623, (Opinion of Knowles, J.)

The date of the grant, under the first definition, is held to mean, in railroad grants, the

date of the definite location of the line of the road.

N. P. R. Co. v. *Barden*, 46 Fed. Rep. 592, 604.

Francoeur v. *Newhouse*, 43 Fed. Rep. 238.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 620.

This definition fixes the time at which these lands must be known to be mineral to be excepted from the grant, at the date of filing the map of definite location, on the theory that by that act the sections granted are identified so as to attach the title granted to the specific tracts.

We shall, as in the case of the phrase "free from pre-emption or other claims or rights" adopt, for the purposes of this case, that definition of the term "mineral lands" sanctioned by the decisions of the interior department; and for the same reason, viz., that it is the law under which the grant is adjusted, the law by which the company's claim to every tract of land is determined, in the first instance at least. That definition is the third; that those lands only are excluded as "mineral lands" which are known to be mineral at the date of patent or certification.

Says Secretary Noble:

"The exception from the grant is explicit, unequivocal and absolute. It is 'that all mineral lands shall be excepted from the operation of this act.' There can be no reasonable question about the interpreta-

tion of this language. It clearly means that no 'mineral lands' were granted or intended to be granted by the act. The discovery of the mineral character of lands within the lateral limits of the grant, after the date when it acquired precision, only proves that such lands were always mineral lands, and serves to bring them clearly within the excepting clause of the grant. They are, and were, no less 'mineral lands' because not *known* to be such, at the date of the grant, or at the date when it acquired precision.

It is not questioned that the land department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved or otherwise disposed of,' or subject to 'a pre-emption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists, there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status at the date when the rights of the company attached under the grant. If, in the prosecution of this inquiry, the lands are discovered to be mineral, or if, prior to patent, or certification where patent is not required, such discovery is otherwise made, and brought to the attention of the land department, in either event, the discovery proves the land to have been mineral at the date mentioned, and serves to bring it within the excepting clause of the grant. No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If in fact mineral, they are within the exception, according to the plain terms thereof, whether their mineral character is known at the time of definite location or approval of survey, or not."

C. P. R. Co. v. *Valentine*, 11 L. D. 238, 242.

See also:

Annual Report of the secretary of the interior for 1891, p. 21-2.

N. P. R. R. Co., 13 L. D. 699.

N. P. R. Co. v. *Champ. Con. Mine*, 14 L. D. 699.

And such doctrine is asserted by Judge Knowles to be the law in his dissenting opinion in *N. P. R. Co.* v. *Barden*, 46 Fed. Rep. 609.

It is obvious that it is impossible to determine prior to patent what the known mineral condition of lands will be at that time. The known mineral condition of lands must be constantly subject to change as exploration or chance develops the existence of deposits theretofore unknown.

"There are vast tracts of country in the mining states which contain precious metals in small quantities, but not in sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable."

Davis v. *Wiebbold*, 139 U. S. 507, 519.

Deffeback v. *Hawke*, 115 U. S. 392, 404.

Ah Yew v. *Choate*, 24 Cal. 562, 567.

Merrill v. *Dixon*, 15 Nev. 401, 407.

Alford v. *Barnum*, 45 Cal. 482, 484.

U. S. v. *Reed*, 28 Fed. Rep. 482, 486.

Hunt v. *Steese*, (Cal.) 17 Pac. Rep. 920, 922.

Dughi v. *Harkins*, 2 L. D. 721.

Cutting v. *Reininghaus et al.*, 7 L. D. 265, 267.
Peirano et al. v. *Pendola*, 10 L. D. 536.
Winters et al. v. *Bliss*, 14 L. D. 59.
Berry v. *C. P. R. Co.*, 15 L. D. 463.

These authorities also fully establish that land to be mineral must be more valuable for mining than for agriculture. The character of land as mineral changes, therefore, not only by reason of additional discoveries, but also may change by reason of new improvements whereby lands which, under former known methods of mining, would not justify the expense of their exploitation, are now, or may, in the future, be profitably mined. The character may further change by alterations in the surrounding agricultural conditions whereby the value for agricultural purposes is changed. Every acre of land described in the complaint may become mineral before it is patented, and, if so, it is not granted; and as it is impossible to say now that this change will not occur in any or every portion thereof, it cannot now be said that any portion of it is granted. The difficulties in the way of identifying the lands arising from this cause are even greater than those arising from the doubt whether they were free from claims or rights at the dates of the grant and definite location. There the facts determining whether the lands were so free or not, actually exist; here, since the known mineral condition is subject to

change, and the time when that known condition must determine if the land be granted, is indefinitely in the future, the facts upon which to base the determination do not even exist. It is impossible, therefore, to identify the lands prior to patent as mineral or non-mineral within the terms of the grant, and, consequently, impossible to identify the lands granted prior to that date. And the allegations of the complaint that these lands have never been segregated from the public lands, and have never been identified as granted lands and that the boundaries of the specific lands granted have never been ascertained, not only may be true, but, under the grant, must be true as a matter of law, until the granted lands are patented.

3. LANDS UNIDENTIFIED AS GRANTED LANDS AND UNSEGREGATED FROM THE LANDS OF THE UNITED STATES, ARE NOT TAXABLE.

a. The United States retains, in all of the lands, until their final segregation, an interest sufficient to enable it to perform that duty. And lands in which the United States has such an interest are not taxable. A sale of the lands for taxes would, if valid, necessarily destroy such interest and prevent the performance of such duty.

"No sale of lands for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by the direct act of the legislature itself, it

must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the state, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others."

N. P. R. Co. v. *Traill Co.*, 115 U. S. 600, 610.

Railway Co. v. *McShane*, 22 Wall. 444, 462.

It necessarily, therefore, extinguishes this interest of the United States, and destroys the jurisdiction of the interior department over these lands for all purposes, whether to determine if they are mineral or were subject to claims or rights, or otherwise. If the sale would not confer such a title, it is because there exists no authority to make it. The authority or lack of authority to make the sale must be determined from the facts as known at the time of the sale, not from subsequent events. Should the court hold these lands taxable in this action, and they be sold and a tax deed issued, the tax title holder would have a perfect title. Should anyone thereafter seek to mine on the land, such tax title holder could eject him. If a mine were discovered thereon, it would be his property. Should the United States seek to give a patent to another on the theory that the land was, at the date of such patent, known to be mineral, or had been ascertained to have

been occupied by a qualified settler at the date of definite location or grant and so excepted from the grant, the holder of the tax title, as the holder of the legal and paramount title, could enjoin such action.

Noble v. *Union R. Logging Co.*, 147 U. S. 165, 171-2.

It would be no answer to his claims to say the lands were excepted from the grant and not taxable. His incontrovertible reply would be: at the date of the definite location there were no filings or entries of record for this land; it was not known then, nor at the date of the tax levy or sale, to be mineral land, and the court holds the law to be that lands of which such facts can be predicated, are taxable. Of what avail would it be to show a subsequent discovery of mineral? The tax title would be paramount. The tax sale would have prevented the government from determining what lands had been granted. It would have interfered with the reserved right of the government to exercise jurisdiction over the unpatented lands, thus defeating the intention of congress and interfering with the primary disposal of the public domain. It would, if the land was in fact excluded from the grant, have operated to divest the United States of its title. Can a tax be constitutionally levied upon property where these results will follow the attempt to collect the tax by a sale of the property? There

can be but one answer. The Organic act of Montana territory, the enabling act, and the constitution of the state all forbid the taxation of such property.

Rev. Stat., sec. 1851.

Sec. 4 of Enabling Act of Montana, approved Feb. 22, 1889.

25 Stat. 676.

Ordinance No. 1, Constitution of Montana.

N. P. R. Co. v. *Traill Co.*, 115 U. S. 600-610.

Colorado Co. v. *Commissioners*, 95 U. S. 259, 265.

Railway Co. v. *McShane*, 22 Wall. 444, 462.

Railway Co. v. *Prescott*, 16 Wall. 603, 608.

b. Where the lands of the government and of its grantee are unsegregated and indistinguishable, the government and grantee become tenants in common of the entire tract.

Frasher v. *O'Connor*, 115 U. S. 102, 107.

Freeman on Cotenancy and Partition, § 96, (2nd ed.)

Dubuque, etc., R. Co. v. *Litchfield*, 23 How. 66, 89.

Veeder v. *Guppy*, 3 Wis. 502, 520, *et seq.*

Portage City Case, 8 Op. Atty. Gen. 255, 258.

Griswold v. *Johnson*, 5 Conn. 363, 365.

Such is the relation here. Each party necessarily possesses, until the segregation, a po-

tential interest in the entire mass. in every stick, twig and stone thereon. The fact that the government can, through its agent, the secretary of the interior. determine for itself which lands it has granted, and, by patenting or certifying the same to the railroad company, partition the lands and identify the property of each of the parties is immaterial; until it does so, the tenancy in common remains; the interest of the government in all the lands continues to exist.

Mahoney v. *Van Winkle*, 21 Cal. 553, 577.
Van Reynegan v. *Bolton*, 95 U. S. 33, 36.
Frasher v. *O'Connor*, 115 U. S. 102, 107.

Without discussing whether the interest of the private individual in the property so held is subject to taxation, it is certain the entire tract cannot be assessed and sold for taxes, as the bill shows is attempted to be done here. And where the land as an entirety is assessed to one having but an unsegregated or equitable interest therein. the sale of the land for such taxes will be enjoined at his instance.

Colorado Co. v. *Commissioners*, 95 U. S. 259, 265.

Further, until, the exact amount of land belonging to each party is known, an impossibility here, the extent of the interest to be assessed to either party cannot be known.

c. Certainty in the object taxed is essential

to the legality of every tax. Notice of the action of the taxing officers is a condition precedent to the constitutionality of the tax law and the validity of the tax. The collection of a tax without such notice is taking property without due process of law, and is forbidden.

The Railroad Tax Cases, 13 Fed. Rep. 722, 750.

Burns v. *Multnomah R. Co.*, 15 Fed. Rep. 177, 183.

Cooley on Taxation, 363 *et seq.* (2d ed.)

Such notice to be sufficient, must describe the property so that it can be recognized. The purposes of the description are, *first*, that the owner may have information of the claim made upon him or his property; *second*, that the public, in case the tax is not paid, may be notified what land is offered for sale for the non-payment; *third*, that the purchaser may be enabled to obtain a sufficient conveyance. And if the description does not attain these objects, it is insufficient; and the attempted notice will not amount to a notice in law. It is obvious that notice such as must be given of lands conditioned as those described in the bill must be insufficient. A description of the lands by metes and bounds is of no avail, for each party has a potential interest in each and every part thereof. Nor is it possible to segregate, for the purposes of taxation, the interest of the railroad company and tax that only. The quantity of

the interest of each party is wholly unknown and unknowable. The railroad company may own ninety-nine per cent of the lands, but on the other hand, the United States may own ninety-nine per cent. . The interest of the railroad company cannot, therefore, be assessed or taxed. And in this case the counties have not attempted to tax the interest of the company in the lands, but the lands themselves.

Again it should be remembered that while the company and the government occupy a relationship analogous to a tenancy in common with respect to lands circumstanced as those described in the bill by virtue of their common potential interest, and the necessity of such a relation to enable either party to protect the land from third parties, yet the grant is not of an undivided interest, but of specific lands; and the partition must be, not by setting apart a certain proportion of the lands to each party, but each takes the specific lands as they respectively fall within or without the terms of description in the granting act. Every description, therefore, if it include more than the smallest government subdivision, may include a tract of government land and a tract of railroad land; if it be of the smallest government subdivision it may be determined finally to be all railroad or all government land. The interest of the company in these lands cannot be segregated, therefore, for the purpose of taxation. No notice of the tax proceedings can

be given which will advise the owner as to what claim is made upon him or his property; or that will advise the public of what lands are to be sold; or the purchaser of what land is bought.

The lands described in the bill occupy, for the purposes of taxation, precisely the same position as unsurveyed lands co-terminous with a completed section of the road; and any reasoning that sustains the taxability of these lands, must also sustain the taxability of such unsurveyed lands. The survey is but one step in the identification of the lands. By it the lands included within the even sections are eliminated from the problem. The probabilities of any particular tract in the remaining lands falling within the description in the granting act, are greatly increased; but if that survey does not completely identify the lands, and we have seen that it does not, it cannot alter the *nature* of the relation borne by the government and the company to each specific tract of land remaining unidentified, nor of their relation to each other with respect thereto. That such unsurveyed lands are not taxable has never been doubted. And the same rule must be applied to these lands, and for the same reasons.

It was urged in this case below, by the defendant, and we presume it will be here, that, as to every parcel of land within the limits of the grant, the appellant has had, ever since the

definite location of the road), an absolute title to that parcel, or it has not had and can never have, under the grant, any title thereto whatsoever; that appellant is supposed to know what it owns; and that it should pay taxes on what it knows it owns; that the lands described in the bill are entirely free from all claims by the United States, or they are not owned by appellant; if the former, then it should pay the taxes; if the latter, that it has no interest in the matter and no standing in court.

This argument is based upon the proposition that the company is supposed to know what we have shown, is impossible to be known, either by the company or anyone else. There is no such presumption as that stated by appellee, either in law or in fact. The law is a reasonable science. It is made by reasonable men for reasonable men; and it does not require or presume impossibilities. Lands in which a party has, in common with the United States, a potential interest only, although a potential legal interest, are not taxable.

The supreme court of Iowa, laying down the true rule in such case, says:

"No rules of law or equity would require defendants to pay taxes upon lands which they had no assurance would ever become their property."

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

The argument also overlooks the fact we have pointed out, that, by reason of the lack of identification, each party has a potential interest in every tract. The legal title granted does not attach to the specific tracts until they are so identified as to authorize the grantee to maintain the possession thereof against the world.

Curtner v. *U. S.*, 147 U. S. 662, 675.

But the interest of the plaintiff in advance of such identification is sufficient to enable it to maintain an action to protect the title, is not an open question.

Wis. Cen. R. Co v. *Price Co.*, 133 U. S. 496.

N. P. R. Co. v. *Traill Co.*, 115 U. S. 600, 610.

The conclusion reached, that lands not fully segregated from the public domain, and unidentified, are not taxable, is fully sustained by authorities.

The court in *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 490, 505, in enumerating the conditions which must exist to render taxable lands in the condition of those described in the bill, expressly says: they must be "distinctly defined."

And see also:

Whitney v. *Gunderson*, 31 Wis. 359, 381.

Cedar Rapids & M. Co. v. *Woodberry Co.*, 29 Iowa 248.

I. R. R. L. Co. v. *Story County*, 36 Iowa 48, 51.

Cedar Rapids & M. Co. v. *Carroll Co.*, 41 Iowa 153, 161.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

C. P. R. Co. v. *Howard*. 52 Cal. 227, 230-1.

Litchfield v. *Webster Co.*, 101 U. S. 772, 775.

Says Mr. Blackwell in his work on tax titles:

"Lands held by a railroad company under land grant acts of congress, which have never been certified or set apart, and which are incapable of identification, are not taxable. Taxation denotes and implies identification of the thing taxed."

Blackwell on Tax Titles, §817 (5th ed.)

We submit that upon this ground these lands must be held non-taxable.

POINT II.

THE COMPLAINANT'S CLAIM TO THE TITLE OF THESE LANDS IS IN DISPUTE BEFORE THE INTERIOR DEPARTMENT AND LANDS SO IN CONTEST ARE NOT TAXABLE

The demurrer admits the averment of the complaint that it is claimed these lands are mineral and that the question as to whether the title passed by the grant, is in controversy and pending before the department. *

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* Complaint, Paragraph VIII, Record, 7 (14)

The statutes of Montana require that "courts take judicial notice of the following facts * * * public and private official acts of the legislative, executive and judicial departments of this territory, and of the United States." (Section 643, Code of Civil Procedure, Compiled Statutes of Montana, 1887.) Under this statute the court will take judicial notice of the order by the secretary of the interior suspending the patenting to the plaintiff of any lands in Montana. Elling v. Thexton, (Mont.) 16 Pac. Rep. 934; U. S. v. Williams, (Mont.) 12 Pac. Rep. 853. A copy of the order is, for the convenience of the court, set out herewith:

"WASHINGTON, D. C., October 14, 1889.

"Hon. John W. Noble,

"Secretary of the Interior:

"Sir: Referring to personal interviews with you in my capacity as the accredited agent of Mineral claimants and citizens of Montana, and to documentary evidences on file in your department showing that the selections by the Northern Pacific R. R. Co., are exclusively of lands in mineral districts, and that such selections embrace thousands of recorded mineral claims and extensive mining properties now being prospected, developed and worked, and in view of the irreparable injury which would be caused to the people

In every case where the question has arisen, it has been held that such lands are not taxable.

C. P. R. Co. v. *Howard*, 52 Cal. 227, 231.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

Doe v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 118.

Dickerson v. *Yetzer*, (Ia.) 6 N. W. Rep. 41.

And unless the court is of opinion that under the law there can be no valid contest, we submit it should hold these lands non-taxable.

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and state of Montana by the premature or unlawful conveyance of title to such lands to the railroad company I beg leave to formally file the following requests:

"1. That the commissioner of the general land office be directed to suspend the patenting of lands in Montana to the Northern Pacific R. R. Co. until the mineral or non-mineral character of the lands selected by said company shall have been investigated and definitely ascertained and adjudicated by proper proceedings; and until mineral claimants and the State of Montana shall have opportunity to be heard before the department on questions of law and fact.

"2. That the commissioner be directed to cause to be noted on the lists of the Company's selections the tracts and townships alleged to be mineral in character by affidavits now on file in the Department of the Interior.

"Very respectfully,

"THOMAS G. MERRILL,

"Chairman Citizens Executive Com."

November 4, 1889, the secretary transmitted this letter to the commissioner with the following indorsement, "Referred to commissioner of the general land office with approval of within requests and direction to comply therewith. Please notify me when done." (Signed) J. W. Noble, secretary. This order is still in force.

POINT III.

THESE LANDS ARE NOT TAXABLE UNTIL THE UNITED STATES HAS CEASED TO HOLD ANY SUCH INTEREST IN THEM AS TO JUSTIFY IT IN WITHHOLDING THE PATENTS; AND ARE NOT TAXABLE WHILE THERE REMAINS UNPERFORMED BY THE UNITED STATES AND ITS OFFICERS, THE DUTY OF DETERMINING THE FACTS UPON THE EXISTENCE OF WHICH DEPENDS COMPLAINANT'S RIGHT TO PATENTS, THE DETERMINATION OF THESE FACTS BEING A CONDITION PRECEDENT TO THE ISSUANCE OF SUCH PATENTS.

We have seen that, until the lands granted by the act of July 2, 1864, to aid in the construction of the Northern Pacific railroad are fully defined and identified, the title granted does not attach to the specific tracts; and the United States retains a potential interest therein. We have also seen that this potential interest can only be cut off by the action of the interior department, that no other tribunal is authorized by law either to determine as between the government and the company whether lands are mineral, or in any other manner to control in advance, the determination of that tribunal. Until this question is determined by the department and the potential interest of the United States thereby extinguished, the railroad company is not entitled to a patent for the lands. There is something remaining to be

done, some act to be performed, before its right to the patents is complete. And it is settled that, under these conditions, unpatented lands are not taxable. It is only "when the government has ceased to hold any such right in the property as to justify it in withholding a patent from the donee or purchaser" that the same will be held subject to taxation as his property.

Wis. Cen. R. Co. v. *Price Co.* 133 U. S. 496, 505.

Railroad Co. v. *Prescott*, 16 Wall. 603, 608.

It will not do to say that the determination of this question is a mere ministerial duty. Were it ministerial only, its performance could be compelled by mandamus and would be subject to the control of the courts. It requires for its performance the collection, examination and weighing of evidence. Judgment, discretion, knowledge of the law and balancing of testimony are essential. Such a determination is a judicial action

Iron-Silver M. Co. v. *Campbell*, 135 U. S. 286.

And this action, since it is essential to the extinguishment of the potential interest of the government and to the attachment of the title granted to the specific land, goes to the very foundation of the company's right. Until such action is taken, and the government has, through its agent, recognized the grantee's claim, it must stand in the attitude of

contesting that grantee's title, passively, it may be, but still contesting it, questioning it and doubting it, standing ready to make the passive contest an active one upon the slightest intimation that the facts are not precisely as claimed by the railroad company. While this silent denial and question of these facts claimed by the company continues the lands are not taxable. While there exists a contest before the interior department as to whether these lands fall within the description of granted lands, the issue of such contest depending upon disputed questions of fact, as whether the lands be mineral, the department is not merely justified in withholding patents from the claimant, but it is its duty to do so. The right of the grantee to the patents is not perfect and complete. Until such contest has been determined there cannot be a taxable interest in the lands.

C. P. R. Co. v. *Howard*, 52 Cal. 227, 231.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

Doe v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 118.

Dickerson v. *Yetzer*, (Ia.) 6 N. W. Rep. 41.

And no distinction can be taken between lands concerning the title to which there is an active contest, and lands the title to which is passively disputed, but held subject to the possibility of such active contest being initiated.

If land would not be subject to taxation if a miner should claim it to be mineral and initiate a contest before the land officers, it is not taxable while held subject to the possibility of the initiation of such claim, The initiation of the contest does not change in the slightest the nature or quantity of the government's interest in the land; nor does it alter the company's interest in the land; and if that interest was a taxable one before, it must so continue, notwithstanding the contest. The contest has merely accentuated a doubt, a question, that was before quiescent and unnoticed.

It is no objection that this act remaining to be done is one to be performed by the government and not by the company. The act is but one step in the identification of the lands by the government as preliminary to the issuance of patents; and since it is as essential that lands be non-mineral to be within the grant, as it is that they be in odd numbered sections, it is just as essential to the identification precedent to such patenting that they be determined to be non-mineral, as that they be determined to be within odd sections. In each case the necessary determination can be made by the government alone. The company can do nothing. And the action of the government in surveying the lands is not more essential to the foundation of the company's claim to the specific tracts, than is the determination whether they are mineral or not.

POINT IV.

THE LAND INVOLVED IN THIS ACTION BEING SUBJECT TO EXPLORATION FOR, AND LOCATION OF, VALUABLE MINERAL DEPOSITS, BOTH PLACER AND LODE OR VEIN, AND THOSE THEREOF CONTAINING THE SAME TO OCCUPATION AND PURCHASE, UNDER THE LAWS OF THE UNITED STATES RELATING TO THE EXPLORATION AND PURCHASE OF MINERAL DEPOSITS, AND THE LANDS CONTAINING THE SAME, THEY ARE NOT TAXABLE.

The argument under this head may be briefly stated in a syllogism, as follows:

Major premise: Only the public lands, lands belonging to the United States, are open to exploration and entry for minerals.

Minor premise: The lands described in the bill herein are so open.

Conclusion: These lands are public lands belonging to the United States, and, therefore, are not taxable.

The major premise is incontestable. The mineral law, R. S. 2319, provides for the exploration and purchase of valuable mineral deposits "in lands belonging to the United States." Indeed, it is public land only that congress has authority to grant a license to go upon. After lands have become the private property of an individual there can be no entry thereof, without his consent, for the purpose of exploring for mineral, or for any other purpose.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 624. (Opinion of Judge Sabin.)

Golden Terra M. Co. v. *Mahler*, 4 Morrison's M. Rep. 390, 398.

Davis v. *Wiebbold*, 139 U. S. 507, 528.

Kendall v. *San Juan M. Co.*, 12 Pac. Rep. 198, 201.

Amador Medean G. M. Co. v. *S. S. H. M. Co.*, 36 Fed. Rep. 668.

Iron Silver M. Co. v. *Campbell*, 135 U. S. 286.

Noyes v. *Mantle*, 127 U. S. 348.

Belk v. *Meagher*, 104 U. S. 279, 283.

Abraham L. Miner, 9 L. D. 408.

North Noonday M. Co. v. *Orient Co.*, 11 Fed. Rep. 125.

The minor premise is necessarily involved in the proposition that the odd numbered sections within the limits of the grant which were not known to be mineral at the date the line of definite location was fixed, fall within the exception of mineral lands, and are subject to location and purchase, upon the discovery of metal therein in quantities sufficient to make it "mineral" land at any time after the definite location of the road and prior to patent.

If these odd sections are subject to location

and purchase as mineral lands upon the discovery of mineral therein at any time prior to patent, they are all subject to exploration for minerals until that time. If congress intended to exclude from the grant all lands found to be mineral prior to patent, it must have intended that they should remain, until that patent issued, subject to the right of search. It would be absurd to say that if a person found a mine on these lands by accident, he could locate and purchase it, but that if he found it while searching for it, he could not take advantage of the discovery because search is forbidden. Says this court:

"If their title would not protect them against a discovery of mines in them, neither would it protect them against an invasion of their property for the purpose of exploring for mines."

Davis v. *Wiebbold*, 139 U. S. 507, 525.

N. P. R. Co. v. *Barden*, 46 Fed. Rep 592, 598.

Id. Opinion of Judge Knowles, 623.

And the interior department has constantly held that lands circumstanced as those decribed in the complaint are such "lands belonging to the United States" as to subject them to exploration under the mining laws.

They are, therefore, lands belonging to the United States, and that lands in which the United States has an interest are not taxable cannot be questioned.

POINT V.

THE PLAINTIFF WAS UNDER NO OBLIGATION TO APPEAL TO THE COUNTY BOARD OF EQUALIZATION TO STRIKE FROM THE ASSESSMENT ROLLS LANDS WHICH UNDER THE LAWS OF CONGRESS AND THE ORGANIC ACT OF THE TERRITORY, WERE NOT TAXABLE: AND THE EXISTENCE OF THAT BOARD FURNISHED NO ADEQUATE LEGAL REMEDY WHICH WOULD OUST THE JURISDICTION OF A COURT OF EQUITY.

Says the supreme court of Montana in stating the reasons for its decision in this case:

"If we concede the position of the appellant that the lands which are described in the schedule "A" are not subject to taxation, and that it cannot be required to pay or tender any sum of money in payment of any tax thereon, we assert that the statute, *supra*, has prescribed an ample legal remedy, which must be exhausted before the equitable powers of the court are resorted to."

Record 27 (58).

Before pointing out specifically the errors in law and reason embodied in this statement, and showing that none of the cases cited to support it do so, while some of them most emphatically condemn it, we desire to note the circumstances under which this part of the opinion was rendered. This point was not argued or discussed. It originated with the court itself. Immediately at the close of the reading of the opinion, counsel for the plaintiff made an oral motion for rehearing on this point. The court stated that such a motion could be heard at the succeeding term, but that no stay would be granted preventing the sale of the

lands in the meantime. As the prevention of the sale was the relief sought, the refusal to grant a stay amounted to a practical denial of the motion; and the plaintiff, although ready to argue the motion within twenty four hours, was left without remedy save by this writ of error, which was accordingly sued out.

The section of the Montana statute cited as furnishing an adequate legal remedy is as follows:

"The board of county commissioners of each county shall constitute a board for the correction of the assessment roll and the equalization of assessed value of property, and on the third Monday in the month of September, of each year, said board shall meet at the office of the county clerk, at the county seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said board shall be given by the county clerk by publication for at least two successive weeks, in a newspaper published in said county, if there be one, otherwise by notices posted in five public places immediately prior to the meeting of said board of equalization; but no notice of an adjourned meeting of said board shall be required. Any person feeling aggrieved by any valuation, or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof, and if, in the opinion of said board, any valuation is too high or too low, as compared with other valuations, by the assessor, of similar classes of property, it may equalize the same; but if such equalization results in any increase, the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid. If any person returned as refusing to render a list or to be sworn thereto, can show good cause therefor, the penalty provided may be remitted."

Laws of Montana, 15th Sess., 1887, p. 92.

Statutes of this class are very familiar, and numerous decisions as to their effect upon the right of a plaintiff to resort in the first instance to a court of equity for relief, have been made.

A review of the authorities establishes that under these statutes the rule laid down by the supreme court of Montana, that a party cannot obtain the aid of a court of equity to restrain the sale of property for taxes, unless he has first sought relief from the board of equalization, is confined to cases of excessive assessments, errors in the assessment, irregular taxation, etc., and no authority can be found to sustain the rule when sought to be applied to a case where the property is exempt from taxation. Not only do none of the authorities cited by the Montana court, sustain such a proposition; but several of them strongly deny it;*

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* Stanley v. Supervisors, 121 U. S. 535, cited by the supreme court of Montana, was an action to recover money paid for taxes on bank stock on an excessive valuation. The bank stock was subject to taxation. It was expressly found that the proceedings were not void. The court says:

"It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in SUCH cases, take upon themselves the functions of a revising or equalizing board."

* * * * * * * * * *

"To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, WHERE THE ASSESSING OFFICERS HAD JURISDICTION TO ASSESS THE PROPERTY." P. 549, 550.

And it was further held in this case that redress might be had in a court of equity by an action to restrain the exaction of the excess

as has every court and text writer that has passed upon the subject.

Ill. Cen. R. R. Co. v. *Hodges*, 113 Ill. 323.

Taylor Bros. Iron Works Co. v. *New Orleans* (La.) 11 So. Rep. 3.

Dickey v. *County of Polk*, (Ia.) 12 N. W. Rep. 290, 292.

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and without first going before the board of equalization, even where the land was taxable, if the plaintiff should first pay what was equitably due.

Merrill v. Gorham, 6 Cal. 41, cited by the Montana court, held that where property was taxable, a party claiming to be injured by the manner of making the assessment had an adequate legal remedy by appealing to the board of supervisors sitting as a board of equalization; and having failed so to do, he was not entitled to the aid of a court of chancery.

Dundee M. T. I. Co. v. Charlton, 13 Saw. 25, relied on by the Montana court, was a case of overvaluation on the assessment roll of property properly taxable. It was held the remedy for excessive valuation was by appeal to the board of equalization.

Rio Grande R. Co. v. Scanlan, 44 Tex. 649, was a case where certain defects in the manner of making the assessment of property which was properly taxable, was complained of.

O'Neal et al v. Va. & Md. Bridge Co., 18 Md. 1, is of the same nature. And so is Stewart v. Maple, 70 Pa. St. 221.

Brooks v. Shelton, 47 Miss. 243, was an attempt to enjoin the collection of taxes based on an overvaluation of property conceded to be taxable.

Davis v. Macy, 124 Mass. 193, was a case of overtaxation. It was not contended but that the property was subject to taxation.

The quotation made by the Montana court from Bourne v. Boston, 2 Gray 494, shows that the court in the language used, had no reference to a case where the property was exempt from taxation by law. Great stress is laid on the fact that "a portion of the tax. * * * was rightfully assessed."

In Tripp v. Merchants Mut. Fire Ins. Co., 12 R. I. 435, the court carefully confined its remarks on the exclnsiveness of the remedy by appeal to the board of equalization, to cases where the property was taxable. They say:

"The remedy given is, in our opinion, the only remedy for excessive taxation. An assessment duly made upon persons or corporations WHICH ARE TAXABLE to any extent for the kind of property which is assessed, is conclusive, unless they avail themselves of the

Powder River Cattle Company v. *Board of Commissioners*, 45 Fed. Rep. 323, 327.

McLean v. *Jephson*, 123 N. Y. 142, 147-8.

United States Ex. Co. v. *Allen*, 39 Fed. Rep. 712, 713

Poindexter v. *Greenhow*, 114 U. S. 270, 300, *et seq.*

Stanley v. *Supervisors*, 121 U. S. 535, 549.

Galveston Co. v. *Gas Co.*, 72 Tex. 509, 517.

Court v. *O'Connor*, 65 Tex. 334.

Davis v. *Burnett*, 77 Tex. 3.

Babcock v. *Town of Granville*, 44 Vt. 325, 330.

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remedy prescribed." P. 436.

In Oregon & W. M. S. Bank v. Jordan, 16 Or. 113, also cited by the supreme court of Montana, this distinction between errors in the assessment of taxable property and an attempt to assess property exempt from taxation, is still more clearly expressed. The court says:

"Unless a case can be brought by its particular and peculiar facts under some one of the heads of equity jurisdiction, such as the preventing a multiplicity of suits, removing clouds from title, or the like, equity will not ordinarily interfere UNLESS THE TAX BE ILLEGAL. The remedy prescribed by statute in most cases will be found ample and expeditious, and in such cases it ought to be exclusive."

Burroughs on Taxation, section 102, states the rule thus:

"ERRORS, WHAT TRIBUNAL CORRECTS: WHERE THE ASSESSORS HAVE JURISDICTION OF THE PERSONS OR PROPERTY ASSESSED, they act judicially, and like the judgment of any other tribunal, their acts are conclusive until reversed in the mode prescribed by law." P. 116.

Preston v. Johnson, 104 Ill. 625, which at first appears to sustain the doctrine laid down by the Montana court, is, so far as it does appear to support that doctrine, explained by the same court in Ill. Cen. R. R. Co. v. Hodges, 113 Ill. 323. In this last case they say:

"The concluding sentence in Preston et al. v. Johnson, which reads: 'The remedy through the county board of review and by appeal we regard as adequate and exclusive' although true in that case, is not universally true, and is therefore calculated to mislead." P. 326.

Of the cases cited by the Montana court, therefore, none support the proposition, while at least three of them deny it, as do all text writers on the subject.

LeRoy v. *East Saginaw Railway*, 18 Mich. 233, 238.

McCoy, et al v. *Anderson*, 47 Mich. 502, 505.

Williams v. *Saginaw*, 51 Mich. 120.

Weller v. *St. Paul*, 5 Minn. 70, 79.

City of St. Paul v. *Merritt*, 7 Minn. 198, 206 (Gilf. ed).

Preston v. *Boston*, 12 Pick. 7.

"There are certain objections to the assessment which need not be brought before the board of equalization, because that body would have no authority to adjudicate upon them. In case of erroneous assessment, which is to be corrected by the board of equalization, no action will lie. But when the error or illegality which invalidates a tax is found in the action of such board itself, or in the want of authority to levy the tax or to make the assessment, whereby the tax is not a lawful charge against the tax payer, his remedy is not confined to proceedings before the board of equalization."

Black on Tax Titles, §142 (2nd ed.)

Says Judge Cooley in his great work on Taxation (2nd ed.):

"When the tax is illegal, one is not obliged to apply for an abatement, unless the statute makes that the sole remedy; but he may contest the tax when attempt is made to collect it. p. 748. * * *

"For a merely *irregular* assessment the statutory remedy is also the exclusive remedy p. 750. * *

He may also ask that an assessment made without jurisdiction be vacated; though this is not essential, since *such assessment is altogether illegal and may for that reason be disregarded and contested when steps are taken to enforce it.*" p. 751.

"A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void, nor are they

necessarily injurious. As a rule, therefore, they do not constitute any reason whatever against the tax being enforced. Moreover the law has provided remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. * * *

"*It is not, however, a mere irregularity * * when property which is exempt from taxation by law, is assessed*" p. 775-778.

Mr. High in his work on "Injunctions," after laying down the rule that the sole remedy for inequalities, irregularities and errors in the tax levy, where the statute provides for a tribunal in the nature of a board of equalization, is by appeal to such board; and that if the tax payer neglects to avail himself of that remedy, he will not be allowed the aid of an injunction, adds:

"If, however, the tax is levied upon property which is by law exempt from taxation, it is held that the statutory remedy by application to a board of review is only cumulative and that the tax payer may, at his election, seek his remedy by injunction in the first instance."

High on Injunctions, § 493, (3rd ed.)

The doctrine of these authorities is applicable to the case at bar.

The organic act of Montana conferred chancery, as well as common law, jurisdiction upon the territorial district and supreme courts. *

* "The supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common law jurisdiction." Rev. Stat., sec. 1868.

No attempt to restrict the power to enjoin the enforcement of taxes by sale of the property, which the possession of this chancery jurisdiction gave, was ever attempted by the territorial legislature, further than the creation of a board of equalization with power to equalize the assessed value of property, as provided in section 22 of the act approved September 14, 1887, entitled "An act to provide for the levy of taxes and assessments of property," (heretofore quoted) may have tended to restrict it, by providing a remedy for certain evils.

Section 11 of article VIII of the constitution of Montana, in force at the time of the institution of this action, provides:

"The district courts shall have original jurisdiction in all cases at law, and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine. * * *

"Said courts and the judges thereof shall have power, also, to issue, hear and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction and other original and remedial writs."

The courts therefore, under both the organic act and the state constitution, had full authority to enjoin the sales of these lands, if there was no adequate legal remedy. The Montana court while ruling that the state statute "has prescribed an ample legal remedy, which must be exhausted before the equitable powers of the court are resorted to," does not pretend to interpret or construe that statute.

We may concede that, had it done so, that interpretation, so far as it determined the meaning of the statute, would be conclusive here. But whether, so construed, the statute would furnish such complete and adequate legal remedy as would prevent a court of equity giving its aid, would be a question of general equitable jurisdiction, in the determination of which this court would be in nowise bound by the decision of the state court.

Neves v. *Scott*, 13 How. 268, 271-2.

And as the Montana court has not pretended to interpret the state statute, the duty devolves upon this court, *first*, to determine the meaning of the statute; *second*, to determine whether the statute as interpreted furnishes an adequate legal remedy.

The board of equalization is the creature of the statute. It has no power or authority except such as is given it by the act of its creation.

That act authorizes the county commissioners to meet on the third Monday of September of each year for the "correction of the assessment roll and the equalization of taxes." It further provides that "any person feeling aggrieved by any valuation or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof, and if, in the opinion of said board, any valuation is too high or too low, as compared with other valuations, by the assessor, of

similar classes of property, it may equalize the same." This is the sole authority conferred; and we submit that it does not authorize the board to pass upon the legality of a tax upon any particular piece of property, and to strike such property from the assessment roll. Under this statute the board of equalization could not have granted the only relief the plaintiff could have asked.

Babcock v. *Granville*, 44 Vt. 325, 330.

People v. *Board of Supervisors*, 44 Cal. 613.

People v. *Ashbury*, 44 Cal. 616, 619.

P. M. S. S. Co. v. *Board of Supervisors*, 50 Cal. 282, 283.

Davis v. *Burnett*, 77 Tex. 3, 4.

District Township of Taylor v. *Moore, et al.*, 39 Iowa, 605.

Biggs v. *Buckingham*, (Del.) 23 Atl. Rep. 858.

And if such be the construction of the statute, it afforded no relief to plaintiff.

But if we concede that the board had authority to determine in the first instance whether the tax on these lands was legal or not, and to strike the lands from the roll if exempt, yet the remedy provided is inadequate. The statute provides for no personal notice to the taxpayers of the property assessed. The law provides that the board shall meet on a certain day for the equalization and correction of the assessment roll. This provision is notice to all tax payers

in the county as far as regards their taxable property. All such property is presumed to appear upon the roll; and it is made the duty of the tax payer to ascertain for himself whether his property is properly valued, described, etc. The presumption of law is that it is, but an opportunity is given the tax payer to verify this presumption and to have such errors as may have been made, corrected If he neglects to avail himself of that opportunity, he cannot afterwards complain. A different rule, however, applies with reference to property exempt from taxation by law. The holder of such property or of an interest therein, has the right to presume that it will not appear upon the assessment roll. He has a right to rest upon this presumption; and is under no obligation to watch the assessment roll to see that the law is not violated, or to anticipate the doing of an illegal act by the assessor. No duty rests upon him to attend the meeting of the board of equalization to thwart the doing of a thing which the law says shall not be done. The notice of the meeting of the board is not constructive notice that his exempt property is on the rolls. Consequently such board affords him no adequate relief.

Ill. Cen. R. R. Co. v. *Hodges*, 113 Ill. 323, 325-6.

McLean v. *Jephson*, 123 N. Y. 142, 147-8.

There is no evidence that the plaintiff in this

case had any knowledge, until the advertisement of these lands for sale, that they were on the assessment roll or that taxes had been levied thereon. And even if it had knowledge, the whole proceedings being absolutely void, the plaintiff had the right to go into a court of equity in the first instance, if otherwise the case presented would entitle it to equitable relief, and was not bound to exhaust the statutory remedy.

Ill. Cen. R. R. Co. v. *Hodges*, 113 Ill. 323.
Davis v. *Burnett*, 77 Tex. 3.
Morris R. R. Co. v. *Jersey City*, 1 N. J. Eq. 227.
Jones v. *Davis*, 35 Ohio St. 474, 479.
High on Injunctions, § 493 (3rd ed.) and cases cited.

We have assumed in this discussion, that the Montana statute did not make the remedy by appeal to the board of equalization exclusive. There is no language in the act calling for such a construction; nor did the court in this case place their decision upon such an interpretation. On the contrary, they expressly admit that this is not the construction.

N. P. R. R. Co. v. *Carland*, 5 Mont. 146.

And such was the ruling of the United States circuit court for the district of Montana, in

Powder River Cattle Co. v. *Custer Co.*, 45 Fed. Rep. 323, 327-8.

But if we assume that it was the intention by the statute to make the remedy by appeal to the board the only one, the statute would be void; (1) for conflict with the state constitution; (2) for conflict with the organic act.

1. By section 11 of article VIII. of the state constitution, the district courts are given jurisdiction over all cases which involve the legality of any tax, impost, assessment, toll or municipal fine. And the territorial act, if it be construed as creating an exclusive remedy, and so ousting the jurisdiction of the courts, would conflict with this provision.

2. The act as interpreted by the supreme court of Montana, would authorize the assessment and levy of taxes upon the public lands, subject solely to the right of the government, or other party in interest, to apply to the board of equalization for abatement of the taxes. It should be borne in mind that the decision of the Montana court concedes these lands to be non-taxable, and necessarily concedes the ground of the exemption contended for, to-wit: that the United States possesses an interest therein, to be well taken. The opinion therefore, decides that, under the Montana statute, the state has a right to assess and levy taxes upon the lands of the United States; and that if no application is made to the board of equalization, the sale of such public lands cannot be restrained. Upon such a construction

there can be no question but the statute is unconstitutional so far as it purports to affect such public lands or lands exempt from taxation by virtue of the laws of Congress. And no obligation to follow that proceeding for redress in such case could be imposed.

Poindexter v. *Greenhow*, 114 U. S. 270, 295, 301, *et seq.*

United States Ex. Co. v. *Allen*, 39 Fed. Rep. 712, 713.

Taylor Bros. Iron Works Co. v. *New Orleans*, (La.) 11 So. Rep. 3.

POINT VI.

THERE IS EQUITY IN THE BILL.

The prayer of the complaint is for an order of injunction, directed to the county treasurer, enjoining him, his deputy and deputies, his successor or successors in office, from selling the lands described in the complaint, or any portion thereof, for the said pretended taxes, and from executing any tax certificate or certifcates therefor to any person, and that he be forever restrained from collecting, or attempting to collect, said taxes; and that said taxes and tax proceedings be declared void, and be set aside and cancelled. The doctrine is well established that a party is not entitled to relief in equity as a matter of right, on a showing of illegality in tax proceedings. It is necessary

that he should show, in addition, that his case comes under some acknowledged head of equity jurisdiction.

Cooley on Taxation, 760, and cases cited (2d ed.)

Pacific Ex. Co. v. *Seibert*, 142 U. S. 339, 348.

But where lands are not taxable because they have not yet ceased to be a portion of the public domain, or because they are exempt under some state or national statute, equity makes an exception to the general doctrine of non-interference by injunction, and this exception has been so uniformly recognized as to become of itself a governing rule in that class of cases. And it may be laid down as the established doctrine of the courts, that the attempted enforcement of the tax upon land which has been exempted by proper legislative authority from the burdens of taxation, constitutes a grievance of so irreparable a nature as to merit preventative relief by injunction.

1 High on Injunctions, §530 (3d ed.)

Wis. Cen. R. Co v. *Price Co.*, 133 U. S. 496.

Railway Co. v. *McShane*, 22 Wall. 444; affirming 3 Dillon 303.

Railway Co. v. *Prescott*, 16 Wall. 603.

N. P. R. Co. v. *Traill Co.*, 115 U. S. 600.

Ill. Cen. R. R. Co. v. *County of McLean*, 17 Ill. 291.

Ill. Cen. R. R. Co. v. *Hodges*, 113 Ill. 323.
Earl v. *Duras*, (Neb.) 13 N. W. Rep. 206.
M., H. & O. Co. v. *Marquette*, 35 Mich. 504.
M. & G. R. R. Co. v. *Peebles*, 47 Ala. 317, 328.
M., R., F., S. & G. R. R. Co. v. *Morris*, 13 Kan. 302, 312.

The complaint shows conclusively that the lands are not taxable. They are in substantially the same situation as were the lands of the railroad company involved in the case of *N. P. R. R. Co.* v. *Traill Co.*, 115 U. S. 600, where this court sustained injunction as the proper remedy.

But the plaintiff has alleged, in addition, facts bringing the case under acknowledged heads of equitable jurisdiction.

It is alleged that the defendant has advertised these lands for sale and threatens and is about to sell the same for the non-payment of the taxes claimed; and to issue certificates of sale for the same in the form prescribed by the laws of Montana, whereby the rights of the plaintiff in and to these lands will be greatly impaired, a multiplicity of suits concerning the title necessarily occasioned, and a cloud cast upon the title of the lands. *

We will examine these charges in reverse order:

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* Complaint, paragraph XIV., Record, p. 8 (17).

CLOUD ON THE TITLE.

Section two of the revenue law of Montana provides:

"Every tax levied under the provisions of this act is hereby made a lien against any and all the property assessed, and such lien shall attach at the time of such assessment, and shall not be satisfied or removed until such taxes are paid."

Laws of Montana, 15th Sess. 1887, p. 83.

Under this provision the assessment constitutes a cloud upon the title to the land. A lien upon real estate appearing of record with nothing of record to show but that the same may be enforced, and requiring evidence *aliunde* to defeat it, is a cloud on the title to such real estate.

N. P. R. R. Co. v. *Carland*, (Mont.) 3 Pac. Rep. 134, 159; s. c. 5 Mont. 146.

Scofield v. *Lansing*, 17 Mich. 437, 447-8.

M. H. & O. R. R. Co. v. *Marquette*, 35 Mich. 504.

U. P. Ry. Co. v. *Cheyenne*, 113 U. S. 516, 526.

1 High on Injunctions, § 524 (3rd ed.)

By the 39th section of the act approved September 14, 1887, Laws of Montana, 15th Sess. p. 97, the county treasurer is required to make out, sign and deliver to the purchasers of real property sold for taxes, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same is

described in the record of the sales, how much and what part of the tract is sold, the amount of each kind of tax, interest and cost for each tract or lot, for which the same was sold, and that payment has been made therefor.

By the 40th section of the act such certificates are made assignable.

By the 41st section it is provided that real property sold under the provisions of the act, may be redeemed at any time within three years by payment to the treasurer of the amount for which the same was sold and subsequent taxes, and sixty per cent per annum on said amount and on subsequent taxes.

By the 43rd section the treasurer is required immediately after the expiration of the time for redemption, to make out a deed for each parcel sold and remaining unredeemed; and to deliver the same to the purchaser upon the return of the certificate of purchase.

Section 263 of the General Laws of Montana, provides:

"Every conveyance, or other instrument conveying or affecting real estate, which shall be acknowledged or proved and certified as hereinafter prescribed, may, together with the certificate of acknowledgement or proof, be read in evidence without further proof"

Compiled Statutes of Montana, 1887. p. 662.

The supreme court of Montana speaking of the effect of this last statute, in connection with the revenue law making all taxes a lien from the time of assessment, says:

"This statute seems to do away with the common-law doctrine that the recitals in a tax deed are not evidence against the owner of the property, but must be proved by evidence *aliunde*, and to make the tax deed *prima facie* evidence of title. If the statute has this effect, then a party claiming under a tax deed only need to introduce the deed in evidence to make out his case. The production of the deed would be *prima facie* proof that the property described in it was subject to taxation, and that the valuation, assessment and levy was made in pursuance of the statute. That the assessment and levy was not made according to law, or that the property was exempt from taxation, would have to be proved by the adverse party, in order to defeat the claimant's tax title. Such a deed, then, would be a cloud upon the title, and a court of equity in a proper case would interpose by injunction to prevent such a cloud being cast."

N. P. R. R Co. v. *Carland*, (Mont.) 3 Pac. Rep. 134, 159.

Tax certificates and tax deeds issued for the lands described in the complaint, will not be void upon their face. The land is *prima facie* liable to taxation, and evidence *aliunde* must be introduced to show that the land was in fact exempt from taxation, and that the tax deed or certificate is void and a nullity. Such certificate or tax deed then will constitute a cloud upon the title to the land.

Banking Co. v. *Mayor of Jersey City*, 12 N. J. Eq. 227, 228.

N. P. R. R. Co. v. *Carland*, (Mont.) 3 Pac. Rep. 134, 159.

Scofield v. *Lansing*, 17 Mich. 437, 447-8.

M. H. & O. R. R. Co. v. *Marquette*, 35 Mich. 504.

Palmer v. *Rich*, 12 Mich. 414, 419-20.

Johnson v. *City of Milwaukee*, 40 Wis. 315, 327.

Jenkins v. *Rock County*, 15 Wis. 11.

Earl v. *Duras*, (Neb.) 13 N. W. Rep. 206.

Greedup v. *Franklin County*, 30 Ark. 101, 108.

M. & G. R. R. Co. v. *Peebles*, 47 Ala. 317, 328-9.

Fowler v. *City of St. Joseph*, 37 Mo. 228, 240.

1 High on Injunctions, § 525, (3rd ed.)

And a court of equity will enjoin the tax proceedings when the tax is illegal and will result in casting a cloud upon the title of real estate.

U. P. Ry. Co. v. *Cheyenne*, 113 U. S. 516, 526-7.

Huntington v. *C. P. R. R. Co.*, 2 Saw. 503, 514.

Carroll v. *Perry*, 4 McLean, 27.

Carland v. *N. P. R. R. Co.*, (Mont.) 3 Pac. 134, 159-160.

Pettit v. *Shepherd*, 5 Paige, 493, 501.

Pacific Ex. Co. v. *Seibert*, 142 U. S. 339, 348.

1 High on Injunctions §248, 524-529 (3d ed.)

3 Pomeroy Eq. Jur. §1345.

2 Beach on Modern Eq. Jur. §696.

MULTIPLICITY OF SUITS.

That where the collection of the tax would involve the plaintiff in a multiplicity of suits as to the title of lands sold therefor equity will enjoin the sale for an illegal tax, is settled.

U. P. Ry. Co. v. *Cheyenne*, 113 U. S. 516, 526-7.

Pacific Ex. Co. v. *Siebert*, 142 U. S. 339, 348.

County of Anderson v. *Kennedy*, 58 Tex. 616, 624.

L. & N. R. R. Co v. *Gaines*, 3 Fed. Rep 266, 282.

Cooley on Taxation, 761, (2d Ed.)

2 Beach on Modern Eq. Jur. § 697.

It is alleged in the bill that such would be the result here, and the demurrer admits the allegation to be true. Indeed this further appears from the facts set out. It appears from the schedule "A" that 292 separate and distinct parcels of land are advertised for sale. Under the law each tract must be sold separately. If the land be sold, a separate suit must be commenced against each purchaser; and it may well result that over two hundred separate actions would be necessary to quiet the title. In addition, trespass suits innumerable would almost necessarily arise. Under these circumstances a court of equity will take jurisdiction to grant relief in one comprehensive action by restraining the sale.

U. P. Ry. Co. v. *Cheyenne*, 113 U. S. 516, 527-8.

In *County of Anderson* v. *Kennedy*, 58 Tex. 616, the court say:

"Considering the fact that some thirteen tracts of land were sought to be sold, which, if the sale were made, might go into the hands of as many different persons, thus entailing a multiplicity of suits to remove cloud from title, as well as the other averments in the petition, we are of opinion that it states a case which entitled the plaintiff to the relief sought." p. 624.

And see:

L. & N. R. R. Co. v. *Gaines*, 3 Fed. Rep. 266, 282.

C. & N. W. Co. v. *Deg.* 35 Fed. Rep. 866, 882.

2 Beach on Modern Eq. Jur. § 697.

1 Pomeroy's Eq. Jur. § 259-270.

IRREPARABLE INJURY.

There is a sufficient allegation of irreparable injury. If, upon the facts set forth in the complaint, the court can easily see that the injury complained of will be irreparable and irremediable, it is not necessary to set forth that final conclusion in so many words. Such facts are set forth in this complaint. As a matter of law the court will know that the plaintiff has no remedy for injuries which would be done it by sale of these lands for taxes. And the allegation that by such sale the rights of the plaintiff

in and to such lands, and the value thereof, will be greatly impaired, is sufficient to show, when taken in connection with the facts previously alleged, irreparable injury. Irreparable injury to real estate does not mean a mischief which shall destroy its value, but one which shall materially affect its value or use.

Carroll v. *Perry, et al.*, 4 McLean 27.
Burnett v. *Cincinnati*, 3 Ohio St. 87.

For the foregoing reasons we respectfully submit that the decree of the court below should be reversed.

FRED M. DUDLEY,
Solicitor for Plaintiff in Error.

154-130

APR 12 1894

JAMES H. McKENNEY,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1893

No. 357.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

J. L. PATTERSON, COUNTY TREASURER OF
GALLATIN COUNTY, DEFENDANT
IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

BRIEF OF DEFENDANT IN ERROR.

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ELLA L. KNOWLES,
Ass't Attorney General.

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BRIEF OF DEFENDANT IN ERROR.

The exhaustive brief of plaintiff in error evinces a dilligent and extensive research into numerous questions which we conceive to be outside of the material issues in the case, though very naturally leading out of material issues. These issues are discussed generally with such fairness that we do not think it necessary that we should consider them all.

THE STATEMENT OF THE CASE

contained in plaintiff's brief herein, pages 1, 2, 3 and 4, clearly sets up, and the complaint avers, all the conditions essential to plaintiff's title to the lands in question (as we conceive), to-wit: The grant by Congress—Act of July 2nd, 1864; Definite Location of Line of Road; Acceptance thereof by the President; That lands involved are within 40 mile limit; Performance by "*plaintiff of all the things and conditions on its part to be done and performed to entitle it to the lands* INURING TO IT *under the grant*"—"*except* that it has not *repaid* to the United States the *cost of surveying*" these lands.

But it is further alleged in said statement; That the Government has not "certified said lands or any lands in Gallatin County, to plaintiff for the reason that it is *claimed* that said lands are mineral and are excepted from the grant;" "That the question" of plaintiff's title to said lands is now in controversy and pending "before the General Land Office and Secretary of the Interior; "That this failure to patent these lands is *solely* because of their *non-identification* as granted lands; "Tnat the lands granted by said Act of Congress to plaintiff in said County have *never been segregated* from the public lands or *identified*."

The proper assessment of the lands and levy of the

taxes complained of is conceded (brief p. 4). As is also the proper proceedings of the County Treasurer leading up to the threatened sale, which is sought to be enjoined, for delinquent taxes on these lands. To the complaint a general demurrer was intersposed. "The demurrer admitted *facts well pleaded* for the *sole purpose* of determining their *legal sufficiency*."

DOES THE COMPLAINT STATE A CAUSE OF ACTION

authorizing injunction to restrain the threatened sale of these lands by the County Treasurer, *for State and County taxes.*

Any fair analysis of the complaint or the aforesaid "statement of the case," can, it seems to us, result only in the conclusion that both contain, not by inference or concession, but affirmatively, every allegation essential to the legality of the threatened delinquent tax sale: *Provided*, we exclude from this analysis the one alleged question (in its several bearings) of

NON-IDENTIFICATION

"as granted lands." First: Because not "*segregated from the public domain.*"

Second: The proper officers have "refused to *patent* said lands * * * to plaintiff" for that "*it is claimed* that said lands are *mineral.*"

"Non-Identification" would seem clearly, in its broad sense, to embrace all the questions discussed in plaintiff's brief—until and except the question of the statutory necessity of timely appeal to the "County Board of Equalization" (brief, p. 57.)

The first proposition presented by plaintiff (brief, p. 8), is the allegation; "that the lands so granted to said plaintiff * * * have never been segregated from the public lands, have never been identified, and the boundaries of the specific lands * * * so granted, have never been ascertained or determined."

Plaintiff's title *to the lands granted*, is through Act of Congress.

WHAT LANDS ARE GRANTED.

"*Every alternate section of public land not mineral, designated by odd numbers to which the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

Does the complaint contain any allegation which would bring any such alternate section within the exceptions above enumerated?

"Plaintiff's *right* and *title* to *said lands* or *any of them*, is now *unknown, uncertain* and such only as said plaintiff may have secured under and by virtue of said Act of Congress, and plaintiff's compliance therewith."

That plaintiff's

TITLE IS UNKNOWN AND UNCERTAIN

cannot be construed as asserting any interest.

"Injunction will not be granted without allegation of title."

McMillan v. *Farrall*, 7 W. V., 223.
Robinson v. *Carr*, 6 Cal., 273.

"That said question as to whether the title to said lands passed to said plaintiff under and by virtue of said Act, and joint resolutions of Congress and the compliance therewith by said plaintiff, is now in controversy, and pending before the General Land Office and Secretary of the Interior."

"The fact that the title to land is in dispute between claimants and the officers of the United States, and that claimants under Mexican land grants are not in possession, affords no grounds for exemption from taxation." 6 Cal., 273.

"The proper officers of the United States have *failed* and *refused* to *certify said lands* to plaintiff or any lands in said County, for the reason that *it is*

claimed that said lands are *mineral* and excepted from the grant." (How or by whom it is so claimed, is not stated.)

"While lands sold by the United States may be taxed before that Government has parted from the legal title by issuing the patent, the doctrine is to be understood as applicable to cases where the right to patent is complete, and the title is fully vested in the party without any thing more to be paid, or any act to be done, going to the foundation of his right."

Cent. Pac. R. R. Co, v *Howard*, 52 Cal. 230.

(*Citing R. R. Co.* v. *Prescott*, 16 Wall., 608.

Cited and approved, *People* v. *Donnelly*, 58 Cal., 146.

Plaintiff alleges its compliance with all the terms and conditions on its part required to be done under said grant; it follows that absolute and indefeasible title thereupon vested in plaintiff to all the odd numbered sections falling within the grant.

St. P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S., 517.

Denney v. *Dodson*, 32 Fed. Rep. 903.

Schulenberg v. *Harriman*, 21 Wall., 65.

Railway Co. v. *R. R. Co.*, 97 U. S., 491.

The survey of the lands is admitted.

Clearly the survey *segregated* the odd numbered from the even numbered sections, and *identified* them

as the lands inuring to plaintiff on the conditions and subject to, the exceptions named in the grant.

"Whenever the survey is made so that a surveyor or the officer of the Land Department can protract the line of the route, the *identity* of the *lands granted* is mathematically ascertained."

Grinnell v. *R. R. Co.*, 103 U. S., 742.

"A *survey* of the *lands* and *location* of the *road* are necessary to give precision * * * and attach it to *any particular tract*."

Leavenworth R. R. Co. v. *U. S.*, 92 U. S. 741
St. Paul R. R. v. *Winona R. R.*, 112 U. S. 731
Railway Co. v. *Baldwin*, 103 U. S., 426.

"When a line of road is definitely *fixed* and *land surveyed*, title of R. R. Co. then attached to *odd sections*, as *specifically* as if expressly *designated in the grant*." *N. P. R. R. Co.* v. *Majors*, 5 Mont. 135; U. *S.* v. *N. P. R. R. Co.*, 99 U. S. 382.

"With respect to the "lieu lands" as they are called, the right was only "a float" and attached to no specific tracts until the selection was actually made in the manner prescribed." Ib.—*Cedar Rapids R. R. Co.* v. *Herring*, 110 U. S., 39—92 U. S., 741.

The lands granted would thus seem to be fully and clearly "segregated" and "identified,"—subject only

to the exceptions as to mineral character and claims of right.

"CLAIMS OF RIGHTS."

We are content to submit upon the authorities cited in plaintiff's brief, (p. 14, 15 and 16) which for convenience only are here reproduced, as to the substance of the decisions, without the numerous authorities there cited.

The Courts says: "This filing of the map of definite location furnished also the means of determining *what lands* had previously to that moment been *sold, reserved* or *otherwise disposed of* by the United States, and to which a pre-emption or homestead claim had attached; for, *by examining the plats of this land in the office of the register and receiver or in the general land office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of or reserved or a homestead or pre-emption claim had attached to any of them.* In regard to such sections, they were not granted. The *express and unequivocal language* of the statute is that the *odd sections not in this condition are granted.*"

K's. P. R'y Co. v. *Dunmayer*, 113 U. S., 629.

Again: "Of all the words in the English language this word "attached" was probably the best that could have been used. It *did not mean mere settlement, res-*

idence or *cultivation* of the land, but *it meant* a *proceeding* in the *proper land office* by which the inchoate right to the land was initiated." Ib.—Page 644. And when the Courts have had occasion to touch this question they have uniformly announced a similar doctrine.

B. & M. R. Co. v. *Abink*, 14 Neb., 97; 15 N. W. Rep., 317.

In *N. P. R R. Co.* v. *Walker*, 47 Fed. Rep., 681, the Court says: "The bill alleges * * * that at the date the line of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, the *lands mentioned* * * * *were upon* the *records of the district land office and of the office of the commissioner of the general land office free* from *pre-emption* or other *claims or rights.* * * * Assuming these averments to be true, the lands are within the terms of the grant and *the title* to them has *vested in the company.*" Page 683.

Both the averments of the complaint and the arguments herein bring the case at bar within the foregoing rule and statement.

We do not deem it important that we should follow the able and ingenious argument of counsel upon apparent conflict between the rulings of the department and the decisions of the Courts. It will suffice, in this connection, to say that we cannot conceive that the

delay, failure or refusal of government officers to discharge any prescribed duty, or the manner of such discharge, could defeat, or qualify a title by direct grant of the government itself; or that such title being "in dispute between claimants and the officers of the United States * * * would afford grounds for exemption from taxation." 6 Cal., 273. [*C. P. R. Co.* v. *Howard*, 52 Cal., 277, cited in plaintiff's brief (p. 49) to support a contrary doctrine, is not in conflict with the above case.] or that the right to tax could in such case be affected by want of patent —mere evidence of title existing independent of patent. "*Title* was *conveyed* by the grant;" effect of patent to confirm only;" "and issuance of patent not essential to rights of R. R. Co.;" *Wis. Cent. R. R. Co.*, 133 U. S., 510-11; 92 U. S., 733. But it is alleged that plaintiff "has not repaid to the government the cost of surveying said lands."

A sufficient answer to this objection is found in the following: "An Act to Provide for Taxation of Railroad Grant Lands, and for other purposes." Approved July 10th, 1886. Laws 49th Cong. p. 143.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled: That *no lands granted* to any *railroad corporation* by act of Congress shall be *exempt from taxation* by State, Territories and Municipal cor-

porations on *account* of the *lien* of the United States upon the same for the *costs of surveying*, selecting and conveying the same, *or because no patent* has been issued therefor; but this provision shall not apply to lands unsurveyed; *Provided*, That ony such lands sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting and conveying to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further*, that at any *sale* of *lands under* the provisions of *this act* the *United States may become a preferred purchaser* and in such case, the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto.

ALL "CLAIMS OF RIGHT" ARE NOT MATTER OF RECORD.

It is ingeniously argued by plaintiff, (br'f p. 22 and 3), "that the survey "of the lands did not by "pointing out odd numbered sections, render it possible to collect all the facts with reference to any particular tract, and so determine whether it was free from claims or rights

at the necessary dates." That a moments reflection will show this impossible. The greater portion of this land was a wilderness. It was unsurveyed, hundreds of settlers were on it, of whose settlements no knowledge existed save in themselves; with their removal all evidence of their settlement vanished, save perhaps, a mouldering cabin. What became of them, where they went, no man knew, what their intentions in making the settlements were, they alone could tell. If the lands were unsurveyed, what precise lands they claimed, not even they could tell without a return to the lands and an examination of the survey lines. The records of the Interior Department conclusively establish that the evidence to prove a settlement, even where evidence be secured, is frequently, even generally, conflicting and obscure. The all important dates are forgotten, the witness is uncertain, is contradicted by equally positive and reliable witnesses."

It is quite possible, and it may be admitted, that some of the lands are in the condition above indicated: It is equally true that *it is reasonably impossible*, in the nature of things, *that all such facts*, with reference to *every such tract can ever be known*. Should it follow therefrom that all the land shall be always exempt from "its share of the public burdens"? or that any part thereof should be so exempt, without any assertion or pretense of title adverse to plaintiff? It is also

to be remembered that, in case of such adverse title being asserted, then resort is had to the "lieu" lands whereby reimbursement may be had for a contingent, possible failure of title to some (piece of land)

The decision in *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S., 629, that the records of Land Department is the proper evidence of initiation of title would seem conclusive on this question.

MINERAL CHARACTER.

We concede the "First" and "Third" definitions of "mineral land" given by plaintiff (brief, pp. 31 and 32), and as defined by authorities cited:

"*First.* It has been held by the courts that it means only those lands containing mineral in quantities sufficient to add to their richness and to justify expenditures for its extraction, and *known* to be so at the *date* of the *grant*."

Davis v. *Wiebbold*, 139 U. S., 507, 519.
N. P. R. Co. v. *Barden*, 46 Fed. Rep., 594, 592.
Francoeur v. *Newhouse*, 40 Fed. Rep., 618, 620.
Francoeur v. *Newhouse*, 43 Fed. Rep., 236.
N. P. R. Co. v. *Walker*, 47 Fed. Rep., 681, 683-4.

"*Third.* That it is the known mineral condition of the land at the date of patent or certification that determines whether it is 'mineral' or not."

C. P. R. Co. v. *Valentine*, 11 L. D. 238, 242.
N. P. R. Co. v. *Barden*, 46 Fed. Rep., 592, 609, 623. (Opinion of Knowles, J.)

It is not in fact or in terms alleged by plaintiff that any of the lands *are* "mineral"—but that "it is claimed that said lands are mineral," and "that said question is pending before" the Department: If we concede the sufficiency of the allegation of "mineral" character—the *survey* of the lands being also conceded—it follows: The *field notes* and *plats* of the *lands surveyed* are on file in the office of the Surveyor General: Lands found to be "mineral" being required to be so designated therein—as to such as are not so designated, is *prima facie* evidence of non-mineral character. *Cowell* v. *Lammars*, 21 Fed. Rep., 205.

The official return of the Surveyor General, showing that the lands in question are non-mineral and agricultural in character, which being of record in the district land office and in the office of the Commissioner of the General Land Office, is a finding which in itself, by such record and documentary evidence, estops the general government and its departmental officers from adopting a rule that would deprive the plaintiff corporation of the benefit of such finding—

unless a contest has been initiated by a citizen of the United States against the right of the plaintiff to the lands in controversy, or unless some special proceeding has been instituted on the part of the officers of the general government to vacate and set aside the aforesaid findings. The return of the Surveyor General, when so entered of record in the several land offices, determines the character of the lands included in the boundaries of the grant (which have been fully identified by the survey and the filing of the plat), and the findings thereof being favorable to the plaintiff, the same cannot be reversed or set aside, except:

1. By contest inaugurated on the part of a citizen of the United States; or

2. By proceedings instituted by the proper officers of the general government.

Previous notice to the Company would not be a mere incident to such proceedings, but rather the foundation thereof.

Evidently the Surveyor's returns would, *prima facie*, in the discharge of an official duty, determine "the known mineral condition of the lands at the date of patent," or the attaching of plaintiff's title under the grant.

RAILROAD LANDS—MORTGAGED.

It is alleged in the complaint that the Railroad Company has no other right, title, claim, interest, property or possession of, in, or to, any of the lands or premises described in the complaint except such right, title, claim, interest, property or possession as it may have or obtained or secured under and by virtue of the acts and joint resolutions of Congress and in its compliance with the conditions thereof as set out in the bill.

Congress, on the 31st day of May, 1870, by joint resolution of the two houses, authorized the company to issue its bonds to aid in the construction and equipment of its road and secure the same by mortgage on its property, and rights of property of all kinds and description, real, personal and mixed, including its franchise as a corporation. This act of the government was an admission on its part that the complainant herein had not only the equitable but the legal title to the lands.

Denny v. *Dodson*, 32 Fed. Rep., 906.
St. P. & Pac. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S., 7.

The company has not only mortgaged, but it contracts, leases and sells and gives to the purchaser a

warranty deed of these lands, to which deed is attached a release by the mortgagee; which proceeding on the part of the Company is not only an admission that the same are not mineral, but is an evidential fact that they are in possession of the same; and so far as they are concerned estops the Company from asserting that the lands are without the rule laid down in Section 3 of Act of 1862.

The Plaintiff derives title to its lands by virtue of the Act of Congress of 1862, wnich is equivalent to a patent.

It is the highest evidence of title. as it is the direct grant of the fee, which had been in the United States, by the government itself; whereas the patent was only the act of its ministerial officers.

Grignon's Lessee v. *Astor*, 2 Howard, 344.
Langdeau v. *Hanes*, 21 Wallace, 521.
N. P. R. R. Co. v. *Walker*, 47 Fed. Rep., 683.
St. P. & Pac. v. *Northern Pacific*, 139 U. S., page 5.

If plaintiff's lands can be identified only by action of the General Land Office as to whether the lands are or are not mineral, how can plaintiff maintain an action at law, or in equity, in regard thereto? What judgment would plaintiff be entitled to in any case, in

regard to lands which have not been identified as its lands? If the matter of identification of plaintiff's lands is to be left entirely to the Commissioner of the General Land Office, a Court could have no right to proceed by evidence to identify such lands.

CLOUD ON TITLE.

One of the grounds made by the plaintiff in its complaint is that the taxes so assessed and levied upon said lands are a cloud upon the title, and that the certificate of sale, when made by the Treasurer, would cast a cloud upon the title, and cause a multiplicity of suits.

If the actions of the proper officers of Gallatin County in assessing the lands was not warranted by law, or because title was in the General Government, then the assessment would be void, and tax sale would not cloud title.

"The property of the United States * * * * shall be exempt from taxation."

Const. Mont., Art. XII., Sec. 2.

"The people inhabiting said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, * * * ; * * * *no taxes* shall be imposed *by the said State of*

Montana on lands or property therein *belonging* * * * to *the United States.*"

Ordinance No. 1, Second—Constitution, State of Montana.

"The property of the United States * * * is exempt from taxation."

Laws of Montana, Second Session, 1891, p. 73, Sec. 2.

It the United States has *any property* or interest—"*potential*" or otherwise in the land—the tax is void.

Equity will not interfere for the reason that no cloud would be cast upon the title.

Burr v. *Hunt*, 18 Cal., 304.
Hollister v. *Sherman*, 63 Cal., 39.
Pixley v. *Huggins*, 15 Cal., 124.
Lick v. *Ray*, Cal., 88.
The City of Santa Barbara v. *Stearns*, 51 Cal., 501.

Unquestionably some of these lands are non-mineral; unquestionably some part of the tax is due; none has been paid or tendered—and equity will not restrain the whole. If appellant knows, or can ascertain, the character of these lands with sufficient certainty to warrant the sales which it is now, and for years past has been, notoriously and continually mak-

ing to *bona fide* purchasers for value, would not the same information or means of information, justify it in the payment of at least some tax?

If mineral, and so proven, taxes improperly paid, under protest, could be recovered back with interest. Insolvency of defendant is not alleged. That sale would "greatly impair" the value of the lands, as alleged by complainant, is not an *allegation* of "*irreparable injury.*" If any impairment would follow the sale it is the result of appellant's failure to pay any tax, when evidently some tax is due. If any injury seemed imminent, even after the sale and issuance of tax certificate, appellant could remove that, so far as it chooses, by paying to the county treasurer such tax as it does owe, and without hardship. A "multitude of suits"—or any suit—would not imperil result. There might be no purchasers. Private individuals are wary of possible litigation with strong corporations. The whole property would very likely be stricken off to the county for the tax.

It is discretionary with a Court to restrain a sheriff's *sale* to prevent cloud on title; after sale and deed threatened, injunction might be granted. 51 Cal., 501.

INJUNCTION—REMEDY BY.

The Court will not grant a writ of injunction to re-

strain the collection of any tax or any part thereof, nor to restrain the sale of any property for the non-payment of taxes, except:

1. Where the tax, or the part thereof sought to be enjoined, is illegal, or is not authorized by law.

2. Where the property is exempt from taxation. Section 204, Revenue Act of Montana, Second Session, 1891, p. 128.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves gave the right of an injunction in a Court of Equity.

State Railroad Tax Cases, 92 U. S.
Dowes v. *City, of Chicago*, 11 Wall., 110.
Hannerwinkle v. *Georgetown*, 15 Wall., 548.
Purrington et al v. *The People ex rel.*, 79 Ill., 13.
Du Page County v. *Jenks*, 65 Ill., 286.
Mumson v. *Miller*, 66 Ill., 383.
Savings Loan Society v. *Austin*, 46 Cal., 489.
De Wit v. *Hays*, 2 Cal., 470.

If the plaintiff pay illegal tax, recovery could be had in an action at law, affording adequate and complete remedy.

Brewer v. *City of Springfield*, 97 Mass., 154.

The County of Cook v. *The C., B. & Q. R. R.*, 35 Ill., 466.

Dodd v. *The City of Hartford*, 25 Conn., 255.

TAXATION OF RAILROAD LANDS.

The public domain of the United States cannot be taxed. Usually the possession of the legal title by the government determines both the fact and the right of ownership.

The exceptions to this rule is where Congress has prescribed the conditions upon which portions of a domain may be alienated.

Wisconsin R. R. Co. v. *Price County*, 133 U. S., 505.

N. P. R. R. Co. v. *Walker*, Vol. 47, Fed. Rep., 681, Page 143, Laws of 49th Congress.

If it could be held that the grant did not convey perfect title—after fulfillment of conditions—that patent is necessary; then legal title is held in trust for appellant, and its equitable title is sufficient to support the right of taxation. "He who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxation." *Wis. Central R. R. Co.* v. *Price Co.*, 133 U. S., 505. The sale of

these lands and other acts of ownership by the company is a matter of common information.

It is clear that if the title to the land is in the plaintiff then it is liable for the taxes; if not it has nothing to do with the matter, and certainly has no authority to sue or defend on behalf of the United States. It can not affirm and deny at the same time; it is either plaintiffs land or it is not. If the grant under which plaintiff claims is either legal or equitable it is fully protected by the treaty, and a confirmation would relate back to the date of its execution. Should the plaintiff's position be maintained and its grant be confirmed, it would escape during the pendency of this litigation one of the burthens which society has imposed upon property.

This pretense might, with some plausibility, be set up in every case where the title of property was in litigation in our own Courts between private individuals. The plaintiff, we apprehend, is the best judge of its own title, and must determine, at its own risk, whether it is worth paying taxes on or not. It cannot assert its ownership of the lands and deny the legal consequence of such right.

Robinson v. *Garr*, 6 Cal., 275.

PLAINTIFF'S FAILURE TO APPLY TO THE COUNTY BOARD OF EQUALIZATION

"For the *correction*" of "any valuation, or *amount* of *property listed*, or *any other fact appearing on such assessment*," by which plaintiff might have felt "aggrieved"—was decisive against the right of injunction: the State Supreme Court properly so held. (10 Mont., 90; Opinion 100.)

For convenience we quote the Statute:

"The Board of County Commissioners of each County shall constitute a Board for the correction of the assessment roll and the equalization of assessed value of property, and on the third Monday in the month of September, of each year, said Board shall meet at the office of the County Clerk, at the County seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said Board shall be given by the County Clerk by publication for at least two successive weeks, in a newspaper published in said County, if there be one; otherwise by notices posted in five public places immediately prior to the meeting of said Board of Equalization; but no notice of an adjourned meeting of said Board shall be required. Any person feeling aggrieved by any valuation, or amount of property listed, or by any other fact appearing on such assess-

ment, may apply to such Board for the correction thereof, and if, in the opinion of said Board, any valuation is too high or too low, as compared with other valuations, by the assessor, of similar classes of property, it may equalize the same; but if such equalization results in any increase the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid. If any person returned as refusing to render a list or to be sworn thereto can show good cause therefor, the penalty provided may be remitted." *Laws of Montana*, Fifteenth Session, 1887, p. 92.

If the property was taxable, then clearly plaintiff's redress for "any fact appearing on the assessment" by which it felt "aggrieved" was by timely application to the County Board. And this remedy was exclusive—as the authorities hold, with consistent uniformity—(even those cited by plaintiff, brief, 59 *et seq.*) 10 Mont., 103-4-5 and 6, and authorities in this case give a full discussion of this principle.

In conclusion it is contended by defendant in error:

1. That the grant to the Northern Pacific Railroad Company of these lands in question was a grant *in presenti*, the conditions of which have been fully performed and the title absolutely vested in the Railroad Company.

2. That the granting of the land, the location of the road, the survey of the land and the filing of the plat in the General Land Office at Washington, was the segregation and identification of the lands in question.

3. That all of these lands in question granted to the Northern Pacific Railroad Company come within the rule laid down in Section 3, of the Act of Congress of 1862.

4. That the Forty-ninth Congress by Congressional license authorized the taxation of these lands by the State of Montana in accordance with the provisions, terms and conditions of the General Revenue Act of this State.

5. That the General Revenue Act of the State of Montana, approved March 6th, 1891, provides for the taxation of these lands and all thereof; and thereby authorized the proper officers of Gallatin County to list and assess the same, and levy the State and County tax thereon.

The tax was duly levied, and became delinquent; the threatened sale was proper—and injunction was rightfully refused, for these reasons—and for the reason, also, that plaintiff's failure to apply to the County

Board of Equalization for redress was, of itself, fatal to the remedy invoked. The decision of the Supreme Court of the State of Montana, if correct, should be sustained, without reference to the grounds upon which it is based.

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